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Vol. II

~~TRANSCRIPT OF RECORD~~

Supreme Court of the United States

OCTOBER TERM, 1938

No. 2

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

No. 56

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONS FOR CERTIORARI FILED { SEPTEMBER 10, 1937.
MAY 23, 1938.

CERTIORARI GRANTED MAY 31, 1938.

TRANSCRIPT OF RECORD

UNITED STATES CIRCUIT COURT OF APPEALS

for the District of Columbia

No. 5501.

October Term, 1935.

NATIONAL BISCUIT COMPANY,

Plaintiff-Appellant,

v.

WHALE COMPANY,

Defendant-Appellee.

Volume II.

HEADINGS AND TESTIMONY.

(Pages 609 to 1296 inclusive)

**APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF DELAWARE.**

Filed August 10, 1935.

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Ex. No.		Admitted Vol. Page	Printed Vol. Page
1	—Carton of Shredded Wheat, Witness Wallace	I 246
2	—Book Containing Samples of Cartons, Witness DeWeese	I 574	Not printed
3	—Book Containing Sample of Cartons, Witness DeWeese	I 574	Not printed
4	—Book Containing Sample of Cartons, Witness DeWeese	I 574	Not printed
5	—Kellogg Package, Waitress 172/8/11/32, Biltmore Hotel, Providence, Witness Sweet	I 326	... ...
6	—Restaurant Check, Paid September 2, 1932; Biltmore Grill Room, Providence, Witness Sweet	I 327	Not printed
7	—Kellogg Package, Delivered September 2, 1932, Biltmore Hotel, Providence, Witness Sweet	I 327	... ...
8	—Menu, September 2, 1932, Providence, Biltmore Hotel, Witness Sweet	I 327	Not printed
9	—Kellogg Carton, Served, Biltmore Hotel, Providence, September 1, 1932, Witness Sweet	I 328	IV 1
10	—Old Style Carton, Shredded Wheat, Witness Schapansky (Saucer With Two Biscuit)	II 720*	IV 3
11	—Kellogg Package, Grocery, Hamilton, Mass., Witness Sanborn	I 359*	IV 7
12	—Kellogg Carton, Hawthorne Hotel, Salem, Mass., Witness Barlett	I 361*	... ...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

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13	—Menu, Hawthorne Hotel, Salem, Mass., Witness Barrett	I 361*	Not printed
14	—Kellogg Package, Grocery, Salem, Mass., Witness Creedon	I 364*	...
15	—Kellogg Carton, Grocery, Castle Hill, Salem, Witness McCabe	I 366*	...
16	—Kellogg Package, Biltmore Hotel, Providence, Witness Doyle	I 388*	...
17	—Menu, Biltmore Hotel, Providence, Witness Doyle	I 388	Not printed
18	—Large Kellogg Carton or Case, Burlington Grocery, Burlington (Photograph to Be Substituted), Witness Sharpley	I 400*	...
19	—Individual Kellogg Carton, Vermont Lunch, Burlington, Witness Thayer ..	I 406*	...
20	—Menu, Montpelier Tavern, Burlington, Vt., Witness Bradbury	I 408*	Not printed
21	—Individual Box Shredded Wheat With Kellogg's Whole Wheat Biscuit Therein, Dorn's Cafe, Burlington, Vt., Witness Bradbury	I 409*	...
22	—Menu, Vermont Lunch, Burlington, Vt., Witness Bradbury	I 409*	Not printed
23	—Sales Slip, Duritsky's, Uniontown, Pa., Witness White	I 423	Not printed
24	—Kellogg Carton, Duritsky's, Uniontown, Pa., Witness White	I 423	...
25	—Sales Slip, H. L. Black Grocery, Juniata, Pa., Witness Colliflower	I 427	Not printed
26	—Kellogg Carton, H. L. Black Grocery, Juniata, Pa., Witness Colliflower	I 427	...
27	—Sales Slip, Huber's Grocery, Altoona, Pa., Witness Goodman	I 430	Not printed

*Formal offer and admission of exhibit in evidence deleted in condensing record.

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28—Kellogg Carton, Huber's Grocery, Altoona, Pa., Witness Goodman	I	430
29—Sales Slip, Witherow Store, Altoona, Pa., Witness Miller	I	433	Not printed	
30—Kellogg Carton, Witherow Store, Altoona, Pa., Witness Miller	I	433	...	...
31—Kellogg Carton, Isaly's Dairy, Steubenville, Ohio, Witness Trescher	I	445	...	...
32—Kellogg Carton, Restaurant, East Liberty, Witness Borneman	I	446	...	...
33—Kellogg Box With Paper Attached, Isaly's Dairy, Steubenville, Ohio, Witness Keeder	I	451	...	...
34—Kellogg Carton, Kresge's, Steubenville, Ohio, Witness Keenan	I	452	...	...
35—Strip Display Sign, Showing Dish Contain- ing Two Biscuit, Witness Nuber- meyer	I	454	Not printed	
36—Glass Bowl, Witness Nubermeyer	I	454	...	...
37—Kellogg Carton, Restaurant, Cleveland, Ohio, Witness Fisher	I	463	...	...
38-A—Order Slip, Hammer Grocery, Cleveland, Witness Herron	I	464	Not printed	
38-B—Kellogg Box, Hammer Grocery, Cleve- land, Witness Herron	I	464	...	...
39-A—Yellow Slip, Norris Grocery, E. Cleve- land, Witness Lansdowne	I	466	Not printed	
39-B—Kellogg Carton, Norris Grocery, E: Cleveland, Witness Lansdowne	I	466	...	...
40-A—White Slip, Grocery, Lakeview Road, Cleveland, Witness Lansdowne	I	467	Not printed	
40-B—Kellogg Box, Grocery, Lakeview Road, Cleveland, Witness Lansdowne	I	467	...	...
41-A—Yellow Sales Slip, Bob's Grocery, Cleve- land, Witness Schneider	I	469	Not printed	

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41-B—Kellogg Carton, Bob's Grocery, Cleve- land, Witness Schneider	I 469
42-A—Sales Slip, "Y" Grocery, Cleveland, Witness Stibeling	I 470	Not printed	
42-B—Kellogg Carton, "Y" Grocery, Cleveland, Witness Stibeling	I 471	...	...
43—Carton, Kellogg's, Huff Restaurant, Cleve- land, Witness Rohn	I 472	...	...
44—Kellogg Carton, Grocery Store, Detroit, Witness Bernard	I 481	...	...
45—Kellogg Carton, Cafe, Flint, Mich., Wit- ness Harris	I 482	...	...
46—Kellogg Carton, Grocery Store, Detroit, Witness Yorke	I 483	...	...
47—Kellogg Carton, Grocery Store, Flint, Mich., Witness McClellan	I 485	...	...
48—Kellogg Carton, Grocery Store, Flint, Mich., Witness Mellore	I 486	...	...
49—Kellogg Carton Victory Lunch, Detroit ..	I 490	...	...
50-A—Brown Paper Bag, Grocery Store, De- troit, Witness Cowles	I 492	...	...
50-B—Kellogg Carton, Grocery Store, De- troit, Witness Cowles	I 492	...	...
51—Kellogg Carton, Grocery Store, De- troit, Witness Westphal	I 493	...	...
52—G. & H. McMillan's Catalog, Detroit, Wit- ness MacElroy	I 494	Not printed	
53-A—Slip, Menu Card, Restaurant, Chicago, Witness Michalak	I 499	Not printed	
53-B—Kellogg Carton, Restaurant, Chicago, Witness Michalak	I 499	...	...
54—Kellogg Carton, YMCA, Chicago, Witness Loughlin	I 502	...	...
55-A—Card, on Counter, Restaurant, Chicago, Witness Holmer	I 504	Not printed	

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55-B—Kellogg Carton, Restaurant, Chicago, Witness Holmer	I 504
56—Menu Card, Restaurant, Chicago, Witness Holmer	I 504	Not printed	
57—Kellogg Carton, Grocery Store, Chicago, Witness Ristig	I 512	...	...
58—Kellogg Carton, Food Shop, Chicago, Wit ness Korsen	I 513	...	...
59—Kellogg Carton, Grocery Store, Chicago, Witness Rachlin	I 515	...	...
60—Kellogg Carton, Grocery Store, Chicago, Witness Ritter	I 516	...	...
61—Kellogg Package, Grocery Store, Chicago, Witness Golden	I 517	...	...
62—Kellogg Box, Davie's Lunch, Chicago, Witness Skewes	I 520	...	...
63—Kellogg Carton, Restaurant, Washington, D. C., Witness Kleeman	I 528	...	...
64—Kellogg Carton, Grocery Store, Hagers town, Md., Witness Schmidt	I 533	...	...
65—Kellogg Box, Restaurant, Hagerstown, . Md., Witness Schmidt	I 533	...	...
66—Bill From Restaurant, Hagerstown, Md., Witness Schmidt	I 533	Not printed	
67—Kellogg Box, Restaurant, Hagerstown, Md., Witness Schmidt	I 533	...	...
68—Bill, Marked One Box Shredded Wheat, Grocery Store, Chambersburg, Pa., Wit ness Ludwig	I 534	Not printed	
69—Kellogg Box, Grocery Store, Chambers burg, Pa., Witness Ludwig	I 535	...	...
70—Bill From Restaurant, Chambersburg, Pa., Witness Ludwig	I 535	Not printed	
71—Kellogg Box, Restaurant, Chambersburg, Pa., Witness Ludwig	I 535

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72—Sales Slip From Restaurant, Baltimore, Witness Johnson	I 549*	Not printed	
73—Kellogg Carton, Restaurant, Baltimore, Witness Johnson	I 549*	...	...
74—Kellogg Package, Lull Grocery Store, Kalamazoo, Mich., Witness Doyle	I 552*	...	...
75—Kellogg Carton, Sunshine Grocery Company, Kalamazoo, Mich., Witness Doyle	I 553*	...	...
76—Kellogg Package, Grocery Store, Kalamazoo, Mich., Witness Doyle	I 553*	...	...
77—Kellogg Carton, Grocery Store, Kalamazoo, Mich., Witness Doyle	I 553*	...	...
78—Kellogg Carton, Grocery Store, Battle Creek, Witness Doyle	I 553*	...	...
79—Kellogg Carton, Grocery Store, Battle Creek, Witness Doyle	I 554*	...	...
80—Kellogg Package, Grocery Store, South Norwalk, Conn., Witness Cavalier	I 612*	...	...
81—Purchase Slip, Grocery Store, Stamford, Witness Tuttle	I 614*	Not printed	
82—Kellogg Carton, Grocery Store, Stamford, Witness Tuttle	I 614*	...	...
83—Newspaper Schedules (Summary), Witness DeWeese	I 571*	IV 11	
84—Compilation of Numerous Sheets Entitled "Advertising and Promotional Expense in the United States, Canada, and England," Witness DeWeese	I 571*	IV 41	
85—Paper, Letter From Walter H. Page, Witness DeWeese	I 572*	IV 43	
86—List of Publications Referring to Shredded Wheat, Witness DeWeese	I 572*	Not printed	
87 to 112—Books or Albums Containing Records of Shredded Wheat Advertising, Witness DeWeese	I 572*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

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113—Keflogg Package, Grocery Store, New York, Witness Bender	I 618*
114—Sheets (Two), Figures From 1927 and 1928, Tables of Amounts Expended by Advertising Shredded Wheat, Witness Oliva	I 620*	IV 45	
115—Sheets (Four), Showing Expenditures by Media From 1929 to 1932, Witness Oliva	I 620*	IV 48	
116—Cut-out, Floor, Witness Oliva	I 621*	Not printed	
117—Cut-out, Witness Oliva	I 621*	Not printed	
118—Cut-out, Witness Oliva	I 621*	Not printed	
119—Four Price Cards, Witness Oliva	I 621*	Not printed	
120—Eight Carton Inserts, Witness Oliva	I 621*	Not printed	
121—Window Poster, Witness Oliva	I 621*	Not printed	
122—Three Sheet Poster, Witness Oliva	I 622*	Not printed	
123—Shopping Bag, Witness Oliva	I 622*	...	
124—Hanger Card, Witness Oliva	I 622*	Not printed	
125—Hanger Card, Witness Oliva	I 622*	Not printed	
126—Hanger Card, Witness Oliva	I 622*	Not printed	
127—Price Card, Witness Oliva	I 622*	Not printed	
128—Price Card, Witness Oliva	I 622*	Not printed	
129—Four Broadsides, Witness Oliva	I 622*	Not printed	
130—Receipt Book, Witness Oliva	I 622*	Not printed	
131—Restaurant Hanger, Witness Oliva	I 623*	Not printed	
132—Restaurant Menu, Witness Oliva	I 623*	Not printed	
133—Three Window Posters, Witness Oliva	I 623*	Not printed	
134—Window Posters, Witness Oliva	I 623*	Not printed	
135—Price Window Poster, Witness Oliva	I 623*	Not printed	
136—Panel Poster, Witness Oliva	I 623*	Not printed	
137—Postal Card, Witness Oliva	I 623*	Not printed	
138—Letter and Circular Distributed With Free Samples of Shredded Wheat, Witness Oliva	I 623*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

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139—Three Bundles of Sheets of Newspaper Schedules, Witness Oliva	I 624*	Not printed	
140—Kellogg Package, Restaurant, Newark, Witness Fagan	I 635*	...	...
141—Kellogg Package, Grocery Store, New York, Witness Mund	I 638*	...	...
142—Kellogg Package (in Part), Restaurant, Hampstead, Long Island, Witness Parnell	I 641*	...	...
143—Kellogg Package, Grocery Store, Seaford, Witness Tuthill	I 643*	...	...
144—Kellogg Package, Grocery Store, Brooklyn, Witness Evans	I 651*	...	...
145—Kellogg Box, Cafeteria, Brooklyn, Witness Evans	I 652*	...	...
146—Menu, Cafeteria, Brooklyn, Witness Evans	I 655*	Not printed	
147—Kellogg Box, Grocery Store, Witness McCrum	I 656*	...	...
148—New Carton, National Biscuit Co., Witness Oliva	I 657*	...	...
149—Transcript of Annual Sales of Shredded Wheat, Witness Dunlap	I 675*	IV 50	
150—Combined Schedule of Advertising Expenditures, Witness Dunlap	I 675*	IV 51	
151—Kellogg Carton, Cafeteria, New York, Witness MacKay	I 682*	...	...
152—Kellogg Package, Restaurant, Fresno, California, Witness Schapansky	II 716*	...	...
153—Kellogg Package, Black's Package Store, Fresno, California, Witness Schapansky	II 717*	...	...
154—Kellogg Carton, Grocery Store, With Sales Slip, Fresno, California, Witness Schapansky	II 718*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

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154-A—Kellogg Carton, Hotel Berry, Coffee Shop, Sacramento, California, Witness Sowles	II 727*	...
155—Kellogg Carton, Grocery Store, Sacramento, California, Witness Sowles	II 727*	...
156—Menu Card, Smith's Coffee Cup, Stockton, California, Witness Burkner	II 732*	Not printed
157—Kellogg Carton, Smith's Coffee Cup, Stockton, California, Witness Burkner	II 732*	...
158—Kellogg Carton, Foster's Lunch System, San Francisco, California, Witness Baird	II 736*	...
159—Kellogg Carton, Grocery, Berkeley, California, Witness MacCool	II 739*	...
160—Kellogg Carton and Purchase Slip, Miller's Store, Witness Fatjo	II 743*	...
161—Kellogg Package, Santa Clara, California, Witness Van Artsdale	II 767*	...
162—Menu, Steamship Line, Ross, California, Witness Mears	II 1196*	Not printed
163—Menu, Ship Monterey, Ross, California, Witness Mears'	II 1196*	Not printed
164—Menu Card, Restaurant Owner, San Francisco, California, Witness Dubac	II 1235*	Not printed
165—Kellogg Carton, Large Size, Burlingame, California, Witness West	II 1190*	...
166—Kellogg Carton, Burlingame, California, Witness West	II 1190*	...
167—Kellogg's Window Display Carton, Burlingame, California, Witness West	II 1191*	...
168—Kellogg's Window Display Carton, Burlingame, California, Witness West	II 1191*	...
169—Kellogg Carton, Restaurant Owner, Witness Lee	II 1255*	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

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170	—Menu Card, With Paper Attached, Restaurant owner, Witness Fierstine	II 1259*	Not printed
171	—Kellogg Carton, Witness Cooper	II 776*	... ...
172	—Kellogg's Wheel of Knowledge, San Diego, California, Witness Cooper	II 776*	Not printed
173	—Kellogg Carton, Purchaser, San Diego, California, Witness Cooper	II 777*	... ...
174	—Kellogg Carton, Purchaser, Los Angeles, California, Witness MacFarland	II 783*	... ...
175	—Kellogg Carton, Los Angeles, California, Witness MacDuffie	II 787*	... ...
176	—Kellogg Carton, Purchaser, Los Angeles, California, Witness MacDuffie	II 787*	... ...
177	—Keilogg Carton, Purchaser, Glendale, California, Witness Anderson	II 792*	... ...
178	—Kelogg's Individual Carton, Witness Lierley	II 798*	... ...
179	—Kellogg Carton and Cash Slip, Witness Ruch	II 802*	... ...
180	—Clipping, Brownwood Bulletin, Kellogg Sales, Witness Wilde	II 1333*	Not printed
181	—Fort Worth Grocery Co., Price-List, Witness Wilde	II 1339*	Not printed
182	—Kellogg Carton, Witness Bullock	II 882*	... ...
183	—Kellogg Package, Witness Burke	II 884*	... ...
184	—Kellogg Carton, Cellophane Front, Witness Mahaffey	II 889*	... ...
185	—Kellogg Carton, Witness Tutt	II 900*	... ...
186	—Kellogg Carton, Witness Reynolds	II 902*	... ...
187	—Sales Slip, Witness Staloup	II 904*	Not printed
188	—Kellogg Carton, Witness Staloup	II 904*	... ...
189	—Slip of Paper, Witness Hunsaker	II 907*	Not printed
190	—Kellogg Carton, Witness Hunsaker	II 907*	... ...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
191—Kellogg Package, Witness Guthrie	II 936*	...	...
192—Kellogg Carton, Witness Guthrie	II 938*	...	...
193—Menu Card, Witness Guthrie	II 938*	Not printed	
194—Page of the Wichita Independent, Witness Guthrie	II 938	Not printed	
195—Kellogg Package, Witness Branson	II 943*	...	...
196—Purchase Slip, Witness Branson	II 943*	Not printed	
197—Page of the Winona Republican Herald, Dated January 20, 1933, Witness Kol- voord	III 1411*	Not printed	
198—Newspaper Advertisement of the Decatur Home Stores, Witness Kolvoord	III 1415*	Not printed	
199—Old-Style Kellogg Folder Cut, Witness Kolvoord	III 1415*	Not printed	
200—Newspaper Advertisement, Reading Eagle, April 28, 1932, Witness Kelly	III 1443*	Not printed	
201-A—Newspaper Clipping, Kalamazoo Ga- zette, Witness Mahan	III 1476*	Not printed	
201-B—Sheet, Containing Same, Kalamazoo Ga- zette, March 2, 1933; Newspaper Clip- ping, Witness Mahan	III 1476	Not printed	
202—Price-List Put Out by the Kellogg Com- pany, Dated February 1, 1933, Witness Mahan	III 1476*	IV 53	
203—Paper Showing Picture of Kellogg's Whole Wheat Biscuit Containing Two Biscuit in a Dish to Be Addressed to Store Managers, Witness Mahan	III 1477	IV 55	
204—Tear Sheet From the Battle Creek, Michi- gan, Moon Journal, October 21, 1932, Witness Mahan	III 1477	Not printed	
205—Hand-Bill Used by I. G. A. Stores, Wit- ness Mahan	III 1477	Not printed	

*Formal offer and admission of exhibit in evidence deleted in con-
densing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page*	Printed Vol. Page
206—Sheet From the News' Telegraph, Dated March 10, 1933, Sharon, Pa., Witness Ander	III 1638	Not printed	
207—Page Twenty-nine of the Pittsburgh Press, Dated March 25, 1932	III 1638	Not printed	
208—Package of Hat Cleaner, Witness Rush ..	III 1727	...	...
209—Package of Camel Cigarettes, Witness Rush	III 1728	...	
210—Copy of the Reading Eagle, May 5, 1932, Witness Miller	III 1846*	Not printed	
211—Page of the Reading Eagle, February 4, 1932, Witness Miller	III 1846*	Not printed	
212—Sheet Containing Ad of the Kellogg Com- pany of the Reading Eagle, May 12, 1932, Witness Miller	III 1846*	Not printed	
213, 214—(Numbers Skipped, No Such Exhib- its Marked.)			
215—Package Resembling Plaintiff's Exhibit No. 166 (a Kellogg Shredded Whole Wheat Biscuit Carton), Witness Hop- kins	III 1871*	...	
216—Package Resembling Plaintiff's Exhibit No. 165, Witness Hopkins	III 1872*	...	
217—Cardboard Liner, Used by Kellogg Com- pany in Whole Wheat Biscuit Cartons, Witness Hopkins	III 1872*	...	
218—Easel or Study Advertising, Witness Hop- kins	III 1874*	Not printed	
219—Sheet of the Reading Eagle, March 31, 1932, Witness Hopkins	III 1875*	Not printed	
220—Sheet of the Reading Eagle, March 5, 1932, Witness Hopkins	III 1875*	Not printed	
221—Sheet of the Reading Eagle, March 17, 1932, Witness Hopkins	III 1875*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in con-
deleting record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
222—Copy of Modern Merchant and Grocery World, Witness Hopkins	III 1875*	Not printed	
223—Cash-and-Carry Bulletin, Witness Hopkins	III 1875*	Not printed	
224—William Montgomery & Co., Price-List, Witness Hopkins	III 1876*	Not printed	
225—Copy of Modern Merchant and Grocery World, February 9, 1933, Witness Hop- kins	III 1876*	Not printed	
226—Standard Government Form of Bid, Wit- ness Hopkins	III 1879	Not printed	
227—Price Bulletin of Provisional Contracts, Witness Hopkins	III 1879	Not printed	
228—Copies of Requisitions, Consisting of Six Sheets, Witness Ruckman	III 1912*	Not printed	
229—Advertisement, Minneapolis Journal, April 30, 1932, Witness Ruckman	III 1940*	Not printed	
230—Breakfast Menu, Hotel Paxton Coffee Shop, Witness Dubois	III 1947*	Not printed	
231—Menu, Main Dining-Room, Hotel Paxton, Witness Dubois	III 1947*	Not printed	
232—Room-Service Menu, Hotel Paxton, Wit- ness Dubois	III 1947*	Not printed	
233—Board of Control Specifications, Wit- ness Sawyer	IJI 1965*	Not printed	
234—Consolidation Agreement, Dated May 19, 1890, Witness Malone	II 958*	Not printed	
235—Copy of Certificate of Incorporation, Dated May 7, 1900, Witness Malone	II 978	Not printed	
236—Letter, Division Passenger Agent, Atch- ison, Topeka & Santa Fe Railway Co., April 13, 1933, Witness Malone	II 979	Not printed	
237—Certified Copy Resettled Final Decree in Shredded Wheat Company Against Humphrey Cornell Company	III 2005	IV 57	

*Formal offer and admission of exhibit in evidence deleted in con-
densing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted Vol. Page	Printed Vol. Page
238—Menu Card, The Fenway Inn	I 251	Not printed
239—Photographs (24), Illustrating Plaintiff's Operations	I 271	IV 63
240—1 c Diamond-Shape Biscuit	I 271	Not printed
240-A—Photograph of Two Biscuit of Plaintiff's Exhibit No. 240	III 2019	IV 111
241—Box of Cone-Shaped Biscuit	I 272	... ...
241-A—Photograph of Four Biscuit of Plaintiff's Exhibit No. 241	III 2019	IV 113
242—Box of Doughnut-Shaped Biscuit	I 273	... ...
242-A—Photograph of Two Biscuit of Plaintiff's Exhibit No. 242	III 2019	IV 115
243—Box of 3-inch Round-Cut Biscuit	I 274	... ...
243-A—Photograph of Two Biscuit of Plaintiff's Exhibit No. 243	III 2019	IV 117
244—Box of 2-inch Round-Cut Biscuit	I 274	... ...
244-A—Photograph of Three Biscuit of Plaintiff's Exhibit No. 244	III 2019	IV 119
245—Box of 3-inch Round-Moulded Biscuit ..	I 275	... ...
245-A—Photograph of Two Biscuit of Plaintiff's Exhibit No. 245	III 2019	IV 121
246—Box of Biscuit Baked in Automatic Machine	I 276	... ...
247—Sheet Tampa Morning Tribune, July 9, 1932	I 303	IV 123
248—Sheet The Tampa Daily Times, July 8, 1932	I 303	IV 125
249—Sheet The Saint Paul Pioneer Press, April 26, 1933	I 304	Not printed
250—Digest of Style for Government Printing..	I 304*	... ...
251—Stipulation Re Depositions in Connecticut Case	I 306	IV 127
252—Four U. S. Trade-mark Registrations of Plaintiff	I 315	IV 129

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
	No. 85,186, January 30, 1912	I 315	IV 129
	No. 178,725, January 15, 1924	I 315	IV 133
	No. 216,593, August 17, 1926	I 315	IV 131
	No. 213,456, May 25, 1926	I 315	IV 135
253	—Twenty-seven State Registrations of Trade-mark Shredded	I 315	Not printed
254	—Certificate of Incorporation, Natural Food Co.	II 1004	Not printed
255	—Certified Court Order Supreme Court, New ² York, Authorizing Change of Name to Shredded Wheat Company...	II 1005	Not printed
256	—Certificate of Organization National Bis- cuit Co.	II 1005	Not printed
257	—Amendment of Charter of National Bis- cuit Co.	II 1005	Not printed
258	—Second Amendment of Charter of National Biscuit Co.	II 1005	Not printed
259	—Third Amendment of Charter of National Biscuit Co.	II 1005	Not printed
260	—Bill of Sale, 30th April, 1930, From Shredded Wheat Company to National Biscuit Co.	II 1005	Not printed
261	—Carton Purchased at Kenosha on Decem- ber 24, 1932	III 2018	...
262	—Sketches A and B Used in Cross-Exam- ination of Witness Penty	II 1127	Not printed
263	—Report on Hot and Cold Cereals	II 1137	Not printed
264	—Report on Hot and Cold Cereals	II 1137	Not printed
265	—Slip Referred to by Witness Poole	II 1145	Not printed
266	—Package of Plaintiff's Reprocessed Bis- cuit	III 2018	...
267	—Package of Plaintiff's Reprocessed Bis- cuit	III 2018	...
268	—Package of Plaintiff's Biscuit, Part Re- processed	III 2018	...
269	—Bundle of Photographs	III 2018	Not printed

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Printed Vol.	Page
270—Package Like Plaintiff's Exhibit 2, Kellogg's Shredded Whole Wheat Biscuit	III	2018	...	...
271—Defendant's Carton Put Out September, 1932	III	2018	...	...
272—Carton Kellogg's Shredded Whole Wheat	III	2018	...	...
273—Decree in Case of Natural Food Co. v. Bulkley, et al.	III	2020	Not printed	
274—Carton Champion Flake Butters	III	2024	...	...
275—Dupont Company Price-List on Cellophane	III	2036	Not printed	

PLAINTIFF'S EXHIBITS UNDER RULE 46.

A—Publication of the Cyrus Curtis Pub. Co.	III	2019	Not printed
B—Opinion of the Court of Appeals in Williams Case	III	2020	Not printed
C—Decree of Court of Appeals in Williams Case	III	2020	Not printed

DEFENDANT'S EXHIBITS.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
1—Letter of Mr. Sweet	I 340	Not printed	
2—Letter of Mr. Sweet	I 340	Not printed	
3-A—Letter of Mr. Sweet	I 340	Not printed	
3-B—Letter of Mr. Sweet	I 340	Not printed	
4—Kellogg Carton, Witness Hamilton	I 357*	...	
5—Kellogg Carton, Witness Hamilton	I 357*	...	
6—Package Kellogg Whole Wheat Biscuit ..	I 495*	...	
7—Slip of Witness' Signature Torn Off Plaintiff's Exhibit No. 54, Witness Loughlin	I 502*	Not printed	
8—Box or Carton, Kellogg's, Witness Dodge	I 531*	...	
9—Letter and Enclosure; News Release, Re: Suit Against Kellogg, Witness DeWeese	I 604	IV 137	
10—Newspaper Article, Filing of Suit by Shredded Wheat Company, Witness DeWeese	I 604	IV 138	
11—Quaker Muffets Package, Witness Weinstock	I 667*	...	
12—Package, Codfish, Witness West	II 1194*	...	
13—Package, Baker's Cocoanut, Witness West	II 1194	...	
14—Package, Kellogg's Whole Wheat Flakes, Witness West	II 1194*	...	
15—Package, Kellogg's Muffets, Witness West	II 1194	...	
16—Triscuit Carton, Witness Powell	II 1266	...	
17—Wheat Krumbles Carton, Witness Thompson	II 1275*	...	
18—Poster, Wheel of Knowledge, Witness Thompson	II 1277*	Not printed	
19—Poster, Jumbo Kellogg Carton, Witness Thompson	II 1277*	Not printed	
20—Sheets, Ads, Witness Thompson	II 1278*	Not printed	
21—Kellogg's Corn Flakes, Witness Thompson	II 1285	...	
22—Kellogg's All-Bran, Witness Thompson ..	II 1285	...	
23—Kellogg's Pep, Witness Thompson	II 1285	...	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
24—Kellogg's Wheat Krambles, Witness Thompson	II 1285	...	...
25—Kellogg's Rice Krispies, Witness Thompson	II 1285	...	...
26—Kellogg's Kaffee Hag, Witness Thompson	II 1285	...	...
27—Kellogg's Wheat Krispies, Witness Thompson	II 1285	...	...
28—(Number Skipped, No Such Exhibit Marked.)			
29—Kellogg's Whole Wheat Flakes, Witness Thompson	II 1285	...	...
30—Package of Tear Sheets From San Francisco and Oakland Papers	II 775*	Not printed	
31—Package of Kellogg's All-Bran, Witness Anderson	II 1339*	...	...
32—Package of Post's Whole Bran, Witness Anderson	II 1339*	...	...
33—Package of Uneeda Graham Crackers, Witness Anderson	II 1339*	...	...
34—Package of Brown's Graham Crackers, Witness Anderson	II 1339*	...	...
35—Package of Sunshine Dutch Rush, Witness Anderson	II 1339*	...	...
36—Package of Holland Rusk, Witness Anderson	II 1339*	...	...
37—Package of Brown's Vanilla Wafers, Witness Anderson	II 1339*	...	...
38—Package of Uneeda Vanilla Wafers, Witness Anderson	II 1339*	...	...
39—Package of Van Camp's Spaghetti, Witness Anderson	II 1340*	...	...
40—Package of Thrift Spaghetti, Witness Anderson	II 1340*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Printed Vol.
		Page	Page
41	—Package of Swans Down Biscuit Mix, Witness Anderson	II 1340*	...
42	—Package of La France Biscuit Flour, Wit- ness Anderson	II 1340*	...
43	—Package of Uneeda Assorted Biscuit, Wit- ness Anderson	II 1340*	...
44	—Package of Sunshine Specialties Assort- ment, Witness Anderson	II 1340*	...
45	—Package of Baker's Cocoanut, Witness An- derson	II 1340*	...
46	—Package of Premier Spaghetti, Witness Anderson	II 1340*	...
47	—Package of Van Camp's Kidney Beans, Witness Anderson	II 1340*	...
48	—Package of Premier Beans and Pork, Wit- ness Anderson	II 1340*	...
49	—Package of Van Camp's Spaghetti, Witness Anderson	II 1340*	...
50	—Package of LaChoy Shredded Sprouts, Witness Anderson	II 1340*	...
51	—Package of Van Camp's Hominy, Witness Anderson	II 1340*	...
52	—Package of Beech-Nut Pork and Beans, Witness Anderson	II 1340*	...
53	—Package of Battle Creek Fig and Bran, Witness Anderson	II 1340*	...
54	—Package of Van Camp's Hominy, Wit- ness Anderson	II 1340*	...
55	—Package of Beech-Nut Spaghetti, Wit- ness Anderson	II 1340*	...
56	—Package of Baker's Sweet Potato Shred- lets, Witness Anderson	II 1340*	...
57	—Package of Dunham's Original Shred Co- coanut, Witness Anderson	II 1340*	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
58	Package of Baker's Cocoanut Shredded; Witness Anderson	II 1340*	...
59	Package of National Shredded Wheat Bis- cuit, the Larger Individual Carton, Witness Baskett	II 1342*	...
60	Package of National Shredded Wheat Bis- cuit, the Smaller Individual Carton, Witness Baskett	II 1342*	...
61	Photograph of the Interior of the Wyatt Self-Service Store, Witness Baskett ..	II 1344	Not printed
62	Package of Post Toasties, Corn Flakes ..	II 905*	...
63	Package of Genuine Egg Noodles	II 905*	...
64	Postal Card of Clover Farms Store, Reads, "Valuable Coupon," Witness Walters ..	III 1402*	Not printed
65	Jumbo Carton Display, Witness Kol- voord	III 1405*	...
66	Display Piece With Stand, Picturing a Sau- cer With Two Biscuit, Witness Kol- voord	III 1406*	...
67	Grocers' Display Piece Which Holds Car- ton Kellogg's Whole Wheat Biscuit, Witness Kolvoord	III 1406*	...
68	Sheet of Day Advertisements, Winona Re- publican Herald, January 20, 1933, Witness Kolvoord	III 1416	Not printed
69-A and 69-B	Advance Sales Notice, Consist- ing of Two Sheets, Witness Chapelle..	III 1418*	Not printed
70	Package, Kellogg's, Witness Hatfield ..	III 1444*	...
71	Package of Shredded Wheat, Witness Hat- field	III 1444*	...
72	Individual Kellogg Package, Witness Tyler	III 1446*	...
73	Mat, Used in Newspapers in Printing, Wit- ness Kolvoord	III 1449*	...

*Formal offer and admission of exhibit in evidence deleted in con-
densing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
74	—Menu, Referring to Kellogg Carton, Witness Miller	III 1454	...
75	—Small Individual Kellogg Package, Witness Gray	III 1529*	...
76	—Kellogg Individual Package, Witness Gray III	1529*	...
77	—Older Package of Muffetts, Witness Lewis III	1534*	...
78	—Newer Package of Muffetts, Witness Lewis III	1534*	...
79	—Copy of Bid, Woman's Relief Corps Home, Witness Lewis	III 1536*	IV 142
80	—Kellogg Package	III 1631	...
81	—Shredded Wheat Package	III 1631	...
82	—Forty-inch Advertisement, Martins Ferry, Witness Ander	III 1632*	Not printed
83	—Large Set-up Window Photograph Display, Witness Ander	III 1633*	...
84	—A Smaller Set-up Window Photograph Dis- play, Witness Ander	III 1633*	...
85	—Copy of Bid, Tubercular Sanitarium, Cres- son, Pennsylvania (Department of Health)	III 1641*	Not printed
86	—Copy of Bid, 'Specifies Kellogg's Whole Wheat Biscuit, Tubercular Sanitarium, Cresson, Pa., Witness Ander	III 1642*	Not printed
87	—Copy of Bid, Pennsylvania Soldiers' and Sailors' Home, Witness Ander	III 1642*	Not printed
88	—Package, Rippled Wheat, Witness Bell ... II	954	...
89 and 90	—Kellogg Deal Price Cards, Witness Mazman	III 1750*	...
91	—Ross Carton, Witness Witherell	III 1764*	...
92	—Chester Lowry's Blue Book Price List, Witness Bickham	III 1801*	Not printed
93	—Camden Price List, Lowry's Blue Book, Witness Bickham	III 1801*	Not printed

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Printed Vol.	Page	Page
94—Advertisement From Reading Eagle, Feb- ruary 4, 1932, Witness Miller	III	1841*			Not printed
95—Letters From National Biscuit Company to Jobbers, December 1, 1931, Witness Miller	III	1842*	IV	143	
96 and 97—Two Circulars Carrying Advertise- ments of Kellogg's Whole Wheat Biscuit, Witness Moyer	III	1850*			Not printed
98—Story Book of Games, Witness Hopkins ..	III	1863*			Not printed
99—Wheel of Knowledge Chart, Witness Hop- kins	III	1863*			Not printed
100-A—File Copy of Standard Government Form of Bid, for Use by Navy Depart- ment, for Supply Department, U. S. Naval Air Station, Lakehurst, N. J., Witness Hopkins	III	1866			Not printed
100-B—Standard Government Form of Bid, by Navy Department, U. S. Navy Yard, Washington, D. C., Witness Hopkins..	III	1866			Not printed
101—Standard Form of Bid, Dated January 12, 1933, U. S. Naval Air Station, Lake- hurst, N. J., Witness Hopkins	III	1866			Not printed
102—Federal Standard Stock Catalogue, N.C- 191, Witness Hopkins	III	1868			Not printed
103—Small Kellogg Carton, Purchased on Din- ing Car, Northwestern Railroad	III	1944*			
104—Letter to the Kellogg Co. From the F. H. Cobb Co., Inc., Cortland, N. Y., Dated March 22, 1933, an Addendum to the Testimony of Mr. A. J. Twentyman ..	III	1952*			Not printed
105—Case Used for Packing National Shredded Wheat, Witness Sawyer	III	1957*			
106—Sketch, Diagram of Threads, Witness Ma- lone, Made by Mr. Clarke	II	963			Not printed

*Formal offer and admission. Exhibit in evidence deleted in con-
densing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
107—Sketch Diagram of Threads, Made by Witness Malone	II 93*	Not printed	
108—Photostatic Copy of Ad in the Denver Re- publican, Dated March 11, 1894, Wit- ness Hurd	II 974	IV 145	
109—Certificate of Incorporation Colorado Shredded Wheat, January 25, 1895, Witness Hurd	II 977*	Not printed	
110-A and 110B—Government Bid, Fort Logan, Dated April 11, 1933, Witness Copeland	III 1989*	Not printed	
111—Package of Egypt Stick Candy	III 1990		
112—Second Sheet, Page Five, Denver Times, March 17, 1894	III 1990	Not printed	
113—Second Sheet, Page Five, Denver Times, March 10, 1894	III 1990	Not printed	
114—Third Sheet, Page Eight, Daily News, Den- ver, Colorado, July 17, 1895	III 1990	Not printed	
115—Fourth Sheet, Page Eight; Daily News, Denver, Colorado, July 14, 1895	III 1990	Not printed	
116—Fifth Sheet, Page Eight, Daily News, Den- ver, Colorado, July 27, 1895	III 1990	Not printed	
117—Sixth Sheet, Page Eight, Daily News, Denver, Colorado, July 7, 1895	III 1991	Not printed	
118—Seventh Sheet, Page Eight, Daily News, Denver, Colorado, July 10, 1895	III 1991	Not printed	
119—Eighth Sheet, Page Eight, Daily News, Denver, Colorado, July 28, 1895	III 1991	Not printed	
120—Copy of Record in the Case of Shredded Wheat vs. The Humphrey Cornell Co. and Frederick H. Towne, Witness Ross	III 1992	Not printed	
121—Photostatic Certified Copy of Majority Opinion of the U. S. Circuit Court of Appeals, Witness Ross	III 1992	IV 147	
122—Copy of Petition for Rehearing, Witness Ross	III 1993	IV 159	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
123—Kellogg Carton Used From About 1910 to 1912, Witness Ross	III 1999*		
124—Kellogg Carton Used From 1913 to 1914 to Some Time in 1915 Front Panel of Carton Entitled Kellogg's Toasted Wheat Biscuit, Witness Ross	III 2000*		
125—Kellogg Carton Used From 1915 Until 1918 (About) or 1919, Front Face Reads "Copyright 1910 by Kellogg's Toasted Corn Flakes Co." Witness Ross	III 2000*		
126—Certified Copy of Mandate, Witness Ross	III 2005	IV 163	
127—Shredded Wheat Company Chart, "Educa- tional Exhibit of Shredded Wheat Bis- cuit"	I 288*	Not printed	
128—Book of Labels Illustrative of Jordan Tes- timony	II 1002	Not printed	
129—Book of 1929 Newspaper Advertising	II 1003	Not printed	
129-A—Book of 1928 Newspaper Advertising ...	II 1003	Not printed	
129-B—Book of 1929 Newspaper Advertising ...	II 1003	Not printed	
129-C—Book of 1930 Newspaper Advertising ...	II 1004	Not printed	
129-D—Book of 1931 Newspaper Advertising ...	II 1004	Not printed	
129-E—Book of 1932 Newspaper Advertising ...	II 1004	Not printed	
130—Board Containing Samples of Defendant's Cartons, Marked A to R	II 1006		
131—Holder Containing Kellogg Poster Adver- tising Before Suit Brought	II 1016		
132—Packages Prepared by Witness Jordan ...	II 1016		
133—Form Letter to Newspapers Re Kellogg Advertisements	II 1016	Not printed	
134—Five Bundles of Retailer Advertisement of Kellogg's Whole Wheat Biscuit	II 1016	Not printed	
135—Bundle of Retailer Advertisements of Kel- logg's Shredded Wheat Biscuit	II 1016	Not printed	

*Formal offer and admission of exhibit in evidence deleted in con-
densing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
136	Bundle of Retailer Advertisements of Kellogg's Shredded Wheat	II 1017	Not printed
137	Bundle of Retailer Advertisements of Kellogg's Shredded Wheat	II 1017	Not printed
138	Batch of Advertisements of Plaintiff	II 1025	Not printed
139	Odd Advertisements of Plaintiff in Woman's Home Companion	II 1035	Not printed
140	Plaintiff's Pamphlet "Uneeda"	II 1035	Not printed
141	Standard Government Form of Bid, Department of Interior	II 1043	Not printed
142	Federal Specification for Cereals (Breakfast Foods)	II 1043	Not printed
143	Defendant's Bid Naval Supply Department, Norfolk, Va., May 16, 1933	II 1044	Not printed
144	Defendant's Bid Naval Supply Depot, Norfolk, Va., March 15, 1933	II 1045	Not printed
145	Samples of Defendant's Early Advertisements of Kellogg's Toasted Wheat Biscuit	II 1047	Not printed
146	Early Carton of Kellogg's Shredded Whole Wheat Biscuit	II 1048	...
147	Blank Carton Sanitas Toasted Corn Flakes	II 1050	...
148	Advertisements Kellogg's Shredded Krumbles	II 1052	Not printed
149	Carton of Kellogg's Krumbles, Shredded Whole Wheat	II 1053	...
150	Carton Kellogg's Wheat Krumbles	II 1053	...
151	Carton Kellogg's Wheat Krumbles (U. S.)	II 1058	...
152	Letter May 3, 1933, N. A. Relfrich to Kellogg's Sales Co.	II 1059	Not printed
153	Proposal April 8, 1933, to Navy Purchasing Officer, New York	II 1060	Not printed
154	Price Bulletin of Provision Contract for May, 1933, Port of New York	II 1061	Not printed

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol.	Printed Vol.	Page
155	Bid March 3, 1933, Navy Purchasing Office, New York	II	1062	Not printed
156	Bid June 8, 1932, Naval Air Station, Lakehurst, N. J.	II	1062	Not printed
157	Bid February 23, 1933, Selfridge Field, Mich.	II	1063	Not printed
158	Bid May 9, 1933, West Point, N. Y.	II	1063	Not printed
159	Invitation for Bid August 22, 1932, Veterans Administration Home, National Military Home, California	II	1064	Not printed
160	Invitation for Bids, October 25, 1932, Veterans Administration, Washington, D. C.	II	1064	Not printed
161	Invitation for Bids, October 25, 1932, U. S. Marine Hospital, St. Louis, Mo.	II	1064	Not printed
162	Bid March 21, 1932, Fort Benjamin Harrison, Ind.	II	1065	Not printed
163	Bid September 8, 1932, Fort Hoyle, Md.	II	1065	Not printed
164	Invitation for Bids, May 19, 1932, U. S. Property and Disbursing Officer, Trenton, N. J.	II	1065	Not printed
165	Bids January 9, 1932, The Army War College, Washington, D. C.	II	1065	Not printed
166	Bid August 18, 1932, Fort Moultrie, S. C.	II	1066	Not printed
167	Bid November 11, 1932, Langley Field, Va.	II	1066	Not printed
168	Bid January 19, 1933, Fort Crook, Neb.	II	1066	Not printed
169	Bid March 25, 1933, Fort McClellan, Ala.	II	1066	Not printed
170	Bid April 4, 1932, Fort Mason, San Francisco, Cal.	II	1066	Not printed
171	Bid July 21, 1931, Fort Warden, Wash.	II	1067	Not printed
172	Bid July 13, 1932, Quartermaster Supply Officer, Brooklyn, N. Y.	II	1067	Not printed
173	Bid Marine Barracks, Navy Yard, Portsmouth, N. H.	II	1068	Not printed
174	Invitation for Bids, Pennsylvania Department of Health, Sanitarium No. 2, Cresson, Pa.	II	1068	Not printed

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
175—Specification for Cereals, Pa., December 10, 1932	II 1069	Not printed	
176—Specifications State of South Dakota	II 1069	Not printed	
177—Request for Bids, December 19, 1932, Maine	II 1070	Not printed	
178—Proposal, Rockland State Hospital, Orange- burg, N. Y.	II 1070	Not printed	
179—Invitation for Bids, March 13, 1933, Ten- nessee	II 1070	Not printed	
180—Order April 1, 1933, Wassaic State School, Wassaic, N. Y.	II 1071	Not printed	
181—Order January 16, 1933, Newark State School, Newark, N. J.	II 1071	Not printed	
182—Order March 23, 1933, Great Meadow Prison, Comstock, N. Y.	II 1071	Not printed	
183—Order January 14, 1933, Willard State Hos- pital, Willard, N. Y.	II 1071	Not printed	
184—Specifications Division of Purchases and Supplies, Springfield, Ill.	II 1072	Not printed	
185—Individual Carton Kellogg's Whole Wheat Biscuit	II 1072	...	
186—Large Carton Kellogg's Whole Wheat Biscuit	II 1072*	...	
187—Menu Card, Chicago, Milwaukee, St. Paul and Pacific	II 1074	Not printed	
188—Menu Card, Hotel Fort Shelby, Detroit, Mich.	II 1075	Not printed	
189—Bid March 13, 1933, Naval Supply Depot, Norfolk, Va.	II 1088	Not printed	
190—Bid February 11, 1933, U. S. Marine Corps, Navy Building, Washington, D. C.	II 1089	Not printed	
191—Bid of Price Brothers, May 18, 1933, Naval Home, Philadelphia, Pa.	II 1091	Not printed	
192—Plaintiff's Individual Carton, Large Biscuit	II 1098	...	
193—Blueprint Diagrammatic Sketch Defend- ant's Mill	II 1107	Not printed	

*Formal offer and admission of exhibit in evidence deleted in con-
densing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
194—Photographs (13) Illustrating Defendant's Operation	II 1111	Not printed	
195—Sample of Shreds First Time Through Rolls	II 1116	...	...
196—Sample of Shreds Second Time Through Rolls	II 1116	...	...
197—Sample of Shreds Third Time Through Rolls	II 1116	...	...
198—Carton of Fifteen Biscuit at 400 Degrees 1½ Hours	II 1117	...	...
199—Sample of Biscuit With Brown Band	II 1122	...	...
200—Sample of Biscuit With Green Band	II 1122	...	...
201—Sample of Biscuit With K Stamped Thereon	II 1123	...	...
202—Sample of Biscuit With Red Food Coloring	II 1123	...	...
203—Sample of Biscuit With Brown Food Coloring	II 1124	...	...
204—Sample of Biscuit With Green Strip on Top	II 1124	...	...
205—Sample of Biscuit With Green Strip on Bottom	II 1124	...	...
206—Sample of Biscuit With K Impressed Thereon	II 1125	...	...
207—Sample of Biscuit With Brown Stripes	II 1125	...	...
208—Sample of Biscuit With K Impressed Thereon	II 1125	...	...
209—Biscuit as Shown, Sketch A Attached to Exhibit 262	II 1130	...	...
210—Sample Diamond Shape Biscuit	II 1179	...	...
211—Sample Diamond Shape Biscuit	II 1179	...	...
212—Sample Biscuit With Band of Paper	II 1139	...	...
213—Sample Biscuit With Tag	II 1140	...	...
214—Sample Biscuit Enclosed in Envelope	II 1140	...	...
215—Large Card Carrying Samples of Plaintiff's and Defendant's Cartons	II 1151*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol. Page	Printed Vol. Page
216—Large Card Carrying Samples of Cartons of Defendant's Cereal Products	II 1151*	...
217—Defendant's Shipping Container Case No. 360	II 1152	...
218—Defendant's Shipping Container Case No. 324	II 1152	...
219—Window Display Card of Plaintiff	II 1152	...
220—Samples of Defendant's Cartons	II 1153	...
221—Photographs (2) of Store Displays	II 1153	Not printed
222—Letter June 2, 1932, C. K. Brace, Manager, National Biscuit Co., Denver, Col., to All Jobbers	II 1154	IV 169
223—Chart of Kellogg's Shredded Wheat Bis- cuit Cartons	II 1155	Not printed
224—Three Cartons Kellogg's Shredded Krum- bles	II 1155	...
225—Advertisement Chicago Daily Tribune, June 2, 1928	II 1155	Not printed
226—Advertisement The Battle Creek Moon Journal, May 25, 1922	II 1156	Not printed
227—Open Letter of Plaintiff to "Dear Madam"	II 1157	Not printed
228—Carton Complimentary Samples Shredded Whole Wheat	II 1157	...
229—Pamphlet Fifty Ways of Serving Shredded Whole Wheat	II 1157	Not printed
230—Recipes for New and Delicious Energy Dishes	II 1157	Not printed
231—Carton Kellogg's Battle Creek Shredded Wheat	II 1158	...
232—Registration No. 276,592, Battle Creek, Shredded Wheat	II 1158	Not printed
233—Chamber's Journal, January 27, 1900	II 1158	Not printed

*Formal offer and admission of exhibit in evidence deleted in con-
densing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
234—File Wrapper and Contents, Trade-Mark Registration No. 178,725, Shredded Wheat	II 1159	IV 171	
235—File Wrapper and Contents, Trade-Mark Registration No. 213,456 Shredded Wheat	II 1159	IV 181	
236—Book of Trade-Mark Registrations of Plaintiff	II 1160	IV 193	
237—Collection of Correspondence	II 1161	Not printed	
238—Samples of Shredded Paper, Shredded Gel- atine and Shredded Cellophane	II 1161	... ...
239—Reproduction of Kellogg Biscuit Prior to 1920	II 1162	Not printed	
240, 240-A, 240-B—Box of Split Peas, Lima Beans and Pop Corn, With Cellophane Windows	II 1163	... ...
241—Advertisements in Grocery World, Five Sheets	II 1165	Not printed	
242—Perky U. S. Patent No. 548,066, October 15, 1895	II 1166	IV 207	

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Ex. No.		Admitted Vol. Page	Printed Vol. Page
242—Book of Patents Issued to Plaintiff, Viz.:			
Perky & Ford U. S. Patent No. 502,378,			
August 1, 1893	II 1166	V 1	
Perky U. S. Patent No. 520,496, May 29, 1894	II 1166	V 5	
Perky U. S. Patent No. 532,286, Janu- ary 8, 1895	II 1166	V 11	
Perky U. S. Patent No. 532,480, Janu- ary 15, 1895	II 1166	V 15	
Perky U. S. Patent No. 532,481, Janu- ary 15, 1895	II 1166	V 21	
Perky U. S. Patent No. 532,697, Janu- ary 15, 1895	II 1166	V 25	
Perky U. S. Patent No. 532,698, Janu- ary 15, 1895	II 1166	V 29	
Perky U. S. Patent No. 533,551, Febru- ary 5, 1895	II 1166	N 33	
Perky U. S. Patent No. 533,552, Febru- ary 5, 1895	II 1166	V 37	
Perky U. S. Patent No. 533,553, Febru- ary 5, 1895	II 1166	V 41	
Perky U. S. Patent No. 533,554, Febru- ary 5, 1895	II 1166	V 45	
Perky U. S. Patent No. 533,555, Febru- ary 5, 1895	II 1166	V 49	
Montgomery U. S. Patent No. 533,821, February 5, 1895	II 1166	V 55	
Perky U. S. Patent No. 548,086, Octo- ber 15, 1895	II 1166	V 59	
Perky U. S. Design Patent No. 24,688, September 17, 1895	II 1166	V 61	
Perky U. S. Patent No. 571,284, Novem- ber 10, 1896	II 1166	V 65	
Perky U. S. Patent No. 598,745, Febru- ary 8, 1898	II 1166	V 77	

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Perky U. S. Patent No. 614,338, November 15, 1898	II 1166	V 81
Perky U. S. Patent No. 618,288, January 24, 1899	II 1166	V 87
Perky U. S. Patent No. 667,892, February 12, 1901	II 1166	V 91
Perky U. S. Patent No. 678,127, July 9, 1901	II 1166	V 109
Perky U. S. Patent No. 678,625, July 16, 1901	II 1166	V 121
Perky U. S. Patent No. 681,656, August 27, 1901	II 1166	V 135
Burbank U. S. Patent No. 683,100, September 24, 1901	II 1166	V 143
Burbank U. S. Patent No. 683,101, September 24, 1901	II 1166	V 149
Burbank U. S. Patent No. 684,789, October 22, 1901	II 1166	V 155
Burbank U. S. Patent No. 685,671, October 29, 1901	II 1166	V 165
Perky U. S. Patent No. 713,795, November 18, 1902	II 1166	V 169
Perky U. S. Patent No. 746,145, December 8, 1903	II 1166	V 173
Burbank U. S. Patent No. 770,159, September 13, 1904	II 1166	V 181
Horner U. S. Patent No. 785,554, March 21, 1905	II 1166	V 189
Perky U. S. Patent No. 797,604, August 22, 1905	II 1166	V 201
Smith U. S. Patent No. 1,195,114, August 15, 1916	II 1166	V 225
Anderson U. S. Patent No. 1,334,429, March 23, 1920	II 1166	V 231
House U. S. Patent No. 1,502,768, July 13, 1926	II 1166	V 243

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Ex. No.		Admitted Vol. Page	Printed Vol. Page
	Webster U. S. Patent No. 1,592,797, July 13, 1926	II 1166	V 301
	Anderson U. S. Patent No. 1,621,863, March 22, 1927	II 1166	V 313
243—	Valentine U. S. Patent No. 831,909, Sep- tember 25, 1906	II 1166	V 319
244—	Book of Patents Issued to Defendant, Viz.: Valentine U. S. Patent No. 1,102,614, July 7, 1914	II 1166	V 331
	Kellogg U. S. Patent No. 1,159,045, November 2, 1915	II 1166	V 355
	Kellogg U. S. Patent No. 1,189,130, June 27, 1916	II 1166	V 357
	Kellogg U. S. Patent No. 1,197,297, September 5, 1916	II 1166	V 361
	Kellogg U. S. Patent No. 1,783,434, December 2, 1930	II 1166	V 361
	Hanford U. S. Patent No. 4,091,509, March 31, 1914	II 1166	V 373
	Valentine U. S. Patent No. 1,124,363, January 12, 1915	II 1166	V 411
	Valentine U. S. Patent No. 1,143,151, June 15, 1915	II 1166	V 417
245—	Book of Miscellaneous Patents Issued to Others Than Plaintiff or Defendant, Viz.: Cooley U. S. Patent No. 782,109, Feb- ruary 7, 1905	II 1167	V 437
	Williams U. S. Patent No. 820,899, May 15, 1906	II 1167	V 441
	Williams U. S. Patent No. 878,262, Feb- ruary 4, 1908	II 1167	V 445
	Williams U. S. Patent No. 896,964, Au- gust 25, 1908	II 1167	V 451
	Williams U. S. Patent No. 897,182, Au- gust 25, 1908	II 1167	V 455

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Ex. No.		Admitted Vol. Page	Printed Vol. Page
	Williams U. S. Patent No. 931,243, Au- gust 17, 1909	II 1167	V 459
	Williams U. S. Patent No. 949,013, Feb- ruary 15, 1910	II 1167	V 469
	Williams U. S. Patent No. 991,584, May 9, 1911	II 1167	V 489
	Williams U. S. Patent No. 1,024,168, April 23, 1912	II 1167	V 493
	Williams U. S. Patent No. 1,062,627, May 27, 1913	II 1167	V 505
	Black U. S. Patent No. 1,210,589, Janu- ary 2, 1917	II 1167	V 511
	Williams U. S. Patent No. 1,263,009, April 16, 1918	II 1167	V 513
246	Bid of Plaintiff May 8, 1933, Department of Interior, Washington, D. C.	II 1170	Not printed
247	Bid of Plaintiff December 12, 1932, U. S. Marine Corps, Washington, D. C.	II 1171	Not printed
248	Bid of Plaintiff March 17, 1933, U. S. Ma- rine Corps, Washington, D. C.	II 1172	Not printed
249	Bid of Defendant February 3, 1933, Ma- rine Barracks, Dover, N. J.	II 1172	Not printed
250	Advertisement, The Natural Food Co. in New York Daily Tribune, May 12, 1907	II 1176	Not printed
251	Advertisement, The Shredded Wheat Co. in Trade, Detroit, April 9, 1913	II 1176	Not printed
252	Package of Arrowroot Biscuits	II 1177	Not printed
253	Package of Fig Newtons Biscuits	II 1177	Not printed
254	Package of Hydrox Biscuits	II 1177	Not printed
255	Certificate of Incorporation of The Colo- rado Shredded Wheat Co.	II 1177	Not printed
256	Carton of Kellogg's Corn Flakes	II 1178	..
257-A	Clarke Sketch of Cutting of Diamond- Shape Biscuit	II 1178	Not printed

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
258—Chart Illustrating Cartons of Plaintiff's			
Wheat Biscuit and Triscuit	II 1179	Not printed	
259—Box Plaintiff's Butter Thin Biscuit	III 2035	...	...
260—Box Plaintiff's Uneeda Biscuit.....	III 2035	...	...
261—Box Plaintiff's Graham Crackers	III 2035	...	...
262—Box Plaintiff's Premium Flake Crackers ..	III 2035	...	...

DEFENDANT'S EXHIBIT UNDER RULE 46.

A—Proceedings in the Patent Office III 2021 Not printed

Proceedings in the United States Circuit Court of Appeals are included
in Vol. 3-A

JOSEPH F. BECK.

Deposition taken at New York, January 13, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am connected with the advertising business, with the Federal Advertising Agency. I am in no way connected with the National Biscuit Company and never have been. The Federal Advertising Agency is not at the present time connected in any way with the National Biscuit Company. My only interest, let me say, would be the fact that I know both Mr. O'Brien and Mr. Ed Hughes, both in your sales division.

I am quite familiar with the product known as Shredded Wheat, also with the package; and I have used it, I suppose, for probably twenty years. I have been a user and purchaser of Shredded Wheat. It is always on the shelf in the pantry at home. As I do a lot of traveling, I suppose I average three or four Shredded Wheat breakfasts a week, and also at home.

I recognize Plaintiff's Exhibit 1 as the Shredded Wheat package, and, also, the individual one. I also know the color scheme when I see it, and so on. I recognize Plaintiff's Exhibit 21 as the individual package.

The expression "shredded wheat" does not convey to my mind any other product at all. Shredded Wheat, to my mind, is a trade-marked brand, and that trade-marked brand I connect with the product, Shredded Wheat Biscuit, made in Niagara Falls.

About three to four times a year, I make a complete round on a campaign of merchandising advertising, for a number of our clients. That is a trip that usually takes me to Chicago at my first stop, or, possibly, to St. Louis, and then to Kansas City, and Fort Worth, Tulsa, New Orleans, Atlanta, and back home. I have made that complete circuit three times this past

year; and then, I would pick up a piece of it and have been just in connection with one particular account alone for just about three years.

In the course of my travels, I have had occasion to order Shredded Wheat at hotels and restaurants regularly; usually, the better class of hotels, where the individual package is brought out.

As to my experience, while traveling, with respect to ordering and receiving Shredded Wheat, I first took real notice of it, I believe, in July of last year, on one of these complete circuits, in Waco, Texas. I believe it was the Hilton Hotel, or maybe it was the Waco. It is one of that Hilton chain of hotels, which are all throughout Texas.

I took particular notice of that incident, because it was in one of the chain hotels; and I figured it might be well to call that to Jim O'Brien's attention and see that he got it cleared up.

I ordered Shredded Wheat for breakfast; and the waitress brought me, not the Shredded Wheat package that I insisted on, but she came out with the Kellogg package, with the top off, a package like Plaintiff's Exhibit 71. This was in a little sort of coffee shop, a little restaurant connected with the hotel. I was seated at a table. I ordered Shredded Wheat. I do not recall whether Shredded Wheat was shown on the menu. I usually do not look for it there. I have my mind made up as to my regular breakfast. The waitress brought a package like Plaintiff's Exhibit 71. I had no conversation with her at all, not a thing, not in that particular case.

That was not the first time this had occurred to me. This happened right along. As I say, the only reason I took particular notice of that was that it was a chain hotel. I thought, if other people were experiencing the same thing in other hotels of that chain,

Mr. O'Brien was missing a pretty good bet, and he might want to look into it and get the business he was asking for.

This was not the first time. That is the only time I really took particular interest in the fact, because it was a chain of hotels. I do not know how many times it had happened to me before. Any number. Let me say about twenty or twenty-five times, that I know of; not in any specific way; but let me say that I do know that it has happened about that number of times; starting usually about Kansas City. That is usually my first or second hop.

After my experience in Waco, Texas, I reported it to Mr. O'Brien. I said that he probably would want to look into it and see that they were getting the business that they were entitled to. He did look into it; but I do not know what happened.

On this last trip; I think our first stop was Chicago on October 31, 1932. I spent a couple of days there and went on to Kansas City. We were there about the third, fourth, and fifth, and then to Tulsa, at the Mayo Hotel in Tulsa. I am pretty sure it was the seventh of November.

I, along with two other fellows who were having breakfast, ordered Shredded Wheat, in the little coffee shop right off the main lobby. I just asked for Shredded Wheat, and the package that was brought out was that particular Kellogg package, with just the top off, like Plaintiff's Exhibit 71.

I remarked to the waitress that I had ordered Shredded Wheat and that was all that came back to me. Her little comment was "This is Shredded Wheat." So I let it go at that. There was no time for arguing with her. We were in a hurry. That happened at Tulsa, I believe on Sunday and Monday, two days. The second day, I merely ordered Shredded

Wheat and had the idea that I would get the same package with a different waitress, and it did happen. I said nothing more about it. I did remark to both my traveling companions that this was just another one of those cases of brand substitution, a well-advertised trade-marked brand being substituted for another well-advertised one. We were all in the advertising business, and that was our interest in it.

The next stop was at Forth Worth, at the Blackstone Hotel, I believe, on November 9th. They also have this little coffee shop, counter, and tables set up there right off the lobby. Again I ordered Shredded Wheat, and this Kellogg package was brought out. Nothing was said about it. One of the reasons I said nothing was, of course, that the Blackstone Hotel is a favorite of mine; and I would not say anything that might involve any particular young lady or anybody else in the hotel. That was the only time at the Blackstone.

We hopped out of there in a hurry. The next stop was Roosevelt Hotel, New Orleans. We had adjoining rooms, and our breakfast was served in the room. I ordered Shredded Wheat, and the waiter brought up the entire breakfast and an unopened package of Kellogg's, a package like Plaintiff's Exhibit 71. Similar to that. I made no comment about it to the waiter; but it involved a discussion of about ten minutes with one of my partners there.

I did not, on any of these occasions or on any occasion when I ordered Shredded Wheat and the Kellogg package was delivered to me, have occasion to look at the menu card. I knew what I was going to order. As I say, for years I have just had this same idea of about three breakfasts of Shredded Wheat a week. I follow that up every other day, and sometimes I go three or four days in a row with it. I rarely look for Shredded Wheat on the menu; but I know what

I want and I look for that particular package, and I want to get that particular delivery; or, at least, I seem to have a taste for Shredded Wheat.

Those are the specific cases that I remember. I had other cases, but I made no note of them. In fact, the only memorandum that I have of these is this little memorandum right here, which has my expense account and other things on it.

I mentioned it to Jim O'Brien in New York. He said he would like to have me come down and talk to him about it, would like to have the case straightened out down there and get his sales department to work on it. In that connection he introduced me to Mr. Vilas. He wanted to know if I would tell my story to you, which I did. That is the occasion for my being here.

CROSS-EXAMINATION.

THE WITNESS: In all the cases in which Kellogg's was served to me, it was in the individual cartons. Although I might not be able to tell, I doubt very much if it was served in bulk; although I suppose that is the way it goes in lunch places.

In each case when the Kellogg package was brought to me, I recognized right away that it was not the Shredded Wheat package of Niagara Falls, yes. I ate the biscuit in every case where the Kellogg product was served to me. I must say there is a slight difference, in my opinion, and I do not know why, but I will also say that I did not finish the two biscuits in any of the cases. That might also happen with Shredded Wheat.

XQ. 52. In your travels, when you asked for Shredded Wheat, how often were you served the Niagara Falls product?

A. I would say that, in the last year—I have a pretty good idea, just in my travels, in my trips around,

in the last year, say three complete circuits, and all that sort of thing, I would say that, in about sixty per cent. of the cases, I was served Shredded Wheat—no more than sixty per cent.

XQ. 53. And, in the other cases, you were served Kellogg's Shredded Wheat?

A. In the other cases, Kellogg's Shredded Wheat, in that individual package—just in that individual package.

THE WITNESS: I would not say that I would have any other name, any solution for that part of it, other than shredded wheat. Just Shredded Wheat is the only product I ever knew.

If somebody asked me what a kodak was, I would say that was a special Eastman name for camera; and, if somebody asked me what Uneeda Biscuit was, I would say that it was a special or proprietary name for soda cracker. If somebody asked me what a non-proprietary or non-trade-marked name for this product that I had, I would say it would be a shredded wheat biscuit; that would be my idea.

Another name I can give for that product, I would say a whole wheat biscuit, in shreds, whole wheat biscuit shredded, in shredded form. Other than that, or shredded wheat or shredded wheat biscuit, I do not know what it would be. I was very, very much surprised when the waitress, in the case I referred to, said, "Well, that is shredded wheat." I was surprised because of the fact that we were in the merchandising end of the business; and that they, after the amount of money which has been put behind Shredded Wheat—it is the biscuit I wanted—the trade-marked product, Shredded Wheat Biscuit, and, to think that, after the amount of money and time they had spent on the product and the advertising and sales promotion work that had been done, all that money that had been spent on

the public, in getting the public acquainted with their service and getting it over to the public, you see.

It did not occur to me, when the waitress said that that was shredded wheat, that she meant that that was a product made out of wheat in shredded form. Shredded Wheat means only one thing to me. I was astonished when the waitress said, "This is shredded wheat."

I have heard of the secondary meaning of a thing. I know that there is what is supposed to be a secondary meaning; in which the first meaning is that it means the product, and the secondary meaning is that it is a product made at Niagara Falls. I have heard of a double meaning or secondary meaning. I certainly do know that this waitress was talking to me about the secondary meaning or double meaning; but I should think that, after all these years, Shredded Wheat, to that young lady—or, at least, to the manager or someone there, would mean the Shredded Wheat product made at Niagara Falls.

If this young lady had brought me a soda cracker and said, "This is shredded wheat," I would have said, right away, "This is not shredded wheat," surely. And I suppose, to some of these girls, any shredded wheat biscuit to them would be a shredded wheat product. To me, shredded wheat biscuit is made out of wheat, shredded, and put into biscuit form and put up by the Shredded Wheat Company of Niagara Falls. I did not try, in any sense, to tell these people that this was not shredded wheat made by the Kellogg Company at Battle Creek, Michigan. I did not try to argue with them at all. In fact, in several cases, I said, "This looks like Shredded Wheat Biscuit; but it is not the thing that I have ordered."

When I said, "It looks like Shredded Wheat Biscuit," I had no doubt at all, from what I saw of it, that this biscuit was shredded and made out of wheat.

I do not think that a business like the Shredded Wheat business of the Kellogg business would go on unchanged if the advertising were stopped. Ceasing to advertise shredded wheat would mean that there would be a dropping off, I believe.

I realize that there is a great deal of experimentation, as between the many wheat products and corn products and so forth; and that many people do not like those, and that they do not use them year in and year out, throughout their lives; that they use shredded wheat for a while, and then use some other cereal. The facts will prove that. I know that the cereal companies are bringing out demonstrators who are constantly bringing the product to the attention of new users.

It is fair to say that one of the purposes of advertising is to recruit the users who drop out of a product and to put in new users of the article to replace the former users of the product who have dropped out.

I know that the Kellogg Company is a large advertising concern; and I use most of their products, other than this.

I have not seen any of their window displays or newspaper advertising of their Whole Wheat Biscuit, or noticed it. I am in the agency business, doing advertising for advertisers, space and time and marketing work.

If you just put one of either the Kellogg or the National product there, I probably would not notice any difference in size; but I have had enough time to make a comparison; and, to me, the Kellogg biscuit is a bit smaller; that is, it is not as long. I do not know about the other dimensions, as to thickness or height. I would have to see them together. I believe I would notice it in nine cases out of ten, because the first thing I do is to pick it up and break it, like this. In each instance, I noticed the difference in the cartons, of the Kellogg carton from the Niagara Falls

carton. As an advertising man, I would say that that carton was a distinctive carton, as compared with the Niagara Falls biscuit carton.

I am familiar with the Kellogg carton, and I would recognize it as one of the Kellogg family of cartons. I know the name, and I know the style of lettering and so on.

I am conscious of a distinct difference in taste between the Niagara Falls product and the Kellogg product. Of course, I get up with a different taste, as most of us do, on many mornings, just as we do in our shaving habits, and so on.

I know nothing at all about what some of those differences are due to. The difference in taste might be due to the act that we had onions the night before, or broccoli, or something.

I am appearing here voluntarily, not under subpoena. My only interest is to see Jim O'Brien get every piece of business he is entitled to. He is a friend of mine. I mentioned it to him, and he said, "Will you be good enough to tell this to Mr. Vilas?"

I have known of the Kellogg biscuit being on the market for probably three years. Since my first experience with it, it is safe to say that I know this type of product is now being manufactured by two different concerns, the National Biscuit Company at Niagara Falls, and the Kellogg Company at Battle Creek.

I am a constant user of Shredded Wheat. I sometimes try other cereals. If you looked into our pantry, you would probably find Grape-Nuts, Wheatsworth, Kellogg's Corn Flakes, Kellogg's All Bran, certainly Shredded Wheat, and maybe others.

As to trying new products, I used Wheaties once, and Heinz got out a hot cereal three years ago, which I tried. I tried Kellogg's Rice Crispies. I have also used Heinz Rice Flakes, but I have lost my taste for rice cereals.

I hope it is fair to say that advertising of a new product will attract attention and that people will try the new product; otherwise, all this money has been wasted. From my experience around the country, and as an advertising man, I would be firmly of the opinion that advertising of a new cereal product would cause people to try it.

I have heard of shredded coconut. I do not know about shredded codfish.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know how shredded coconut is put up. We have it at home, a Baker product, I believe. It looks good to me, and it is shredded. It may be, as far as I know, a fresh coconut shredded. I mean by that torn up into small shreds, little pieces.

Mr. Clarke asked me if, when I had the conversation with the waitress, any pillow-shaped biscuit apparently made of wheat drawn out into shreds or filaments would, to the waitress' mind, be a shredded wheat biscuit. In my opinion, the waitress would at once apply that name to such a product because of the amount of publicity and promotion put behind Shredded Wheat and the Shredded Wheat Biscuit in that form.

I saw one of the large-sized packages of the Kellogg product down here this morning, just glanced at it. If I saw the package, Plaintiff's Exhibit 147, with the name obliterated and the window on it, through which the contents are visible, that would convey to my mind just one thing as to the contents of the package, and that is Shredded Wheat.

If, in addition to that, I examined the package and saw on one end the words "Shredded Wheat in its most delicious form," and on the other end, "A shredded wheat product," my reaction, as a merchandising and

advertising man, to that would be that it would be a very easy way to substitute this for the product that I know, Shredded Wheat.

I mean by that that a package of that kind, with the words and appearance indicated on Plaintiff's Exhibit 147, is something in the hands of the dealer to promote easy substitution. I think that putting just that little slant in the hands of the dealer, I believe we have learned from experience would be a very good selling point, a very good merchandising point on the dealer's shelf, to substitute this for Shredded Wheat.

I have seen advertising of Shredded Wheat Biscuit, two in a dish; but I am afraid I cannot say that I would distinguish between the Shredded Wheat advertising and that of Kellogg's. I have seen a package like Plaintiff's Exhibit 10. Looking at the other side of Plaintiff's Exhibit 147, I see a picture of two biscuit in a dish. I would say that it is just a bit misleading. I suppose some of our friends would accept that as a Shredded Wheat Biscuit when they asked for it. We would not. By that, I mean that I think some individuals among the purchasing public would be less careful than others in discriminating between packages. I believe that has also been the experience of Rice Crispies, competing with Rice Flakes.

RE-CROSS-EXAMINATION.

THE WITNESS: If I never had any prior experience with the Kellogg biscuit or package and saw Plaintiff's Exhibit 147 for the first time, with the panel or view of the biscuit removed, I would have the idea that Kellogg's Whole Wheat Biscuit was a biscuit. I would be rather curious to see what it would be. Uneeda Biscuit, a soda cracker, is called a biscuit; very many types of English crackers or cakes are called biscuit; and the little muffin type of product that women bake at home

are also called biscuit. So, having in mind the many definitions of biscuit, if I saw this Kellogg package for the first time without any illustration on it, it would arouse my curiosity as to what kind of product was inside of it; but it would not be a package that would tell me what kind of product was in it until I had opened it for the first time. Of course, there would probably be other descriptive matter on that box.

Assuming, however, that there was no other descriptive matter on it, and taking away that little window there, I believe I would have to open up this package to find out what kind of product was in it. To that extent, without descriptive matter or the picture, it is what you might call a blind package.

The use of a dish with some of the product contained in the package, such as spinach or fruit salad, vegetables or cereals, is, in my experience, a very common advertising device. It is a very common form of advertisement to show the product in a dish served in various ways, with different kinds of sauces or fruits on it.

I have had personal experience with forms of what might be called fraudulent substitution, where one package is made to imitate another package so closely that, when a customer asks for the first package and gets the second, she really thinks she has gotten the first package. I have heard of such cases, although I do not believe I could mention to you just what a case might be; but as in the cases mentioned by Mr. Clarke, where people used to ask for Baker's Chocolate and did not get the original, and where they asked for Waterman Pens and got an imitation, thinking they were getting the original.

I would not, in my own mind, think that any woman who was familiar with the Niagara Falls Shredded Wheat package, such as Plaintiff's Exhibit 1, who was given a package like Defendant's Exhibit 6 or Plain-

tiff's Exhibit 147, would think she had gotten the Niagara Falls package.

If, as Mr. Clarke says, some grocers have testified that, on telephone orders, if they were to send the Kellogg biscuit when people asked for the Niagara Falls biscuit, some customers would send the package right back, I think very few would send it back, not necessarily that they would want to try it, but because of the bother of it all, so much bother that they would not want to send it back.

I have never been in the grocery business myself; although, as I say, I have had some experience along merchandising lines. I have spent a day or two in the grocery store, with mixed and blended coffee, etc., in several stores on Long Island and actually waited on people in the store, although just for a few days at a time, just for the experience.

I am familiar with the old and the new campaigns of the National Biscuit Company and Shredded Wheat Company advertising Niagara Falls Shredded Wheat. The recent or present campaign is a very good one, I think, much better than the old one of just the little ads. In my mind, the name *Niagara Falls* has been associated strongly in connection with all the advertising of that product.

RE-DIRECT EXAMINATION.

THE WITNESS: When I said I thought the majority of people would not return a package like Plaintiff's Exhibit 147, if it were sent them as Shredded Wheat, I meant that was my impression of the average psychology of the purchasers.

As I said to Mr. Clarke, if a customer asked for Shredded Wheat and were given this package, like Plaintiff's Exhibit 147, she would know right away that it was not the Niagara Falls product. I believe

the dealer would say right away. "This is Shredded Wheat Biscuit." I would not be surprised if dealers, in some instances, said "This is the same thing." As I say, I believe those two lines would be a good basis for that kind of selling, on the part of the dealer. As a merchandising and advertising man, I do not approve of that kind of selling.

RE-CROSS-EXAMINATION.

THE WITNESS: If, in self-service stores, where a customer picks up a basket and goes through the store, selecting what she wants from the shelves, I found a substantial number of women who picked out the Kellogg product, I would assume that that is what they wanted, in some cases, probably; but I believe that, with the window idea, which, as I say, I looked over this morning up here, any number of women would pick up that package, wanting the Shredded Wheat or Shredded Wheat Biscuit made at Niagara Falls. That, of course, as I say, is based entirely on the amount of money and promotion effort that has been put behind Shredded Wheat; certainly a whole lot more than has ever been put behind the Kellogg's Whole Wheat Biscuit.

In self-service stores, with a display of both the Niagara Falls Shredded Wheat and the Kellogg's shredded wheat, I think very few women who picked up the Kellogg's shredded wheat would do it because they wanted the Niagara Falls package that was right there on the shelf. I think that, in many cases, the people who did pick it up would pick it up because they wanted that Kellogg package.

RE-DIRECT EXAMINATION.

THE WITNESS: There is no question that, as to self-service stores, the result would depend somewhat on

the way in which the packages were displayed. I am familiar with the Piggly-Wiggly type of self-service store, where a customer has to go in and pass through all the aisles before she can get out. I would say that those customers of poorer education, having in mind purchasing Shredded Wheat, if the Kellogg product was displayed in advance of the Shredded Wheat product in packages with a window like Plaintiff's Exhibit 147, would probably pick that up for Shredded Wheat, quite a few; but, as far as the better classes go, I do not believe they would pick up the Kellogg package if they wanted Shredded Wheat. In foreign language sections and among the poorly educated, I think they would.

Children are frequently sent to the store to purchase such products, and I think the window idea would probably appeal to the youngsters, even though they were sent out to get Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: There are usually a number of competitive brands to products like canned baked beans, ketchup, tomato juice, canned tomatoes, etc. I would expect to find Campbell's Baked Beans and Heinz' Baked Beans, and probably one or two other brands. That is also true of corn flakes, that there are a number of manufacturers making different brands. There are quite a number of private label brands of corn flakes.

I do not know of any other product besides Shredded Wheat, where the claim is made that only one manufacturer has the right to make that product.

I have known for at least three years that there are at least two different concerns making Whole Wheat Shredded Biscuit, that pillow-shaped biscuit. I do not doubt that it may have been before that that I was personally acquainted with them.

RE-DIRECT EXAMINATION.

THE WITNESS: I should think it would be perfectly above-board and legal to make another biscuit; but I have wondered and mentioned the fact that this particular biscuit, being styled the same or looking the same as Shredded Wheat—in fact, I started several years ago to wonder why Kellogg made a biscuit that looked so similar and were able to cash in on some of the merchandising work put behind Shredded Wheat.

I remember the advertising of a biscuit put out by the Quaker Oats Company, called Muffetts. I do not remember what the advertising was like; but I do know the name *Muffetts*. I do not really know what the product appears like. I have never paid any attention to that particular product.

GEORGE SCHAPANSKY.

Deposition taken at San Francisco, California,
February 8, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have never had any business connection with the National Biscuit Company. I am a salesman in the Frigidaire Corporation through Fisher & Glassford, a hardware and Frigidaire concern in Fresno, California.

I have had experience in the grocery business as a clerk for approximately a year.

I recognize Plaintiff's Exhibit 1. It is Shredded Wheat. I recognize the item Mr. Vilas takes out of Plaintiff's Exhibit 1 as Shredded Wheat Biscuit. I have been familiar with Shredded Wheat approximately ten to fifteen years and have been a user of it in my home. I use it right along.

During the period I have known it, it has always been of the same general shape, appearance and size. It is very similar to what it has always been. I used to think, years ago, that the biscuits were joined together. It just seems to me that, a couple of years ago, when I was first acquainted with it, I have at times seen two biscuit fastened together.

The thing in particular by which I identify Plaintiff's Exhibit 1, that I always paid attention to, was the picture of Niagara Falls on the package. In my experience, there has never been anything, other than Plaintiff's Exhibit 1 or the biscuit therein meant to my mind by the term "Shredded Wheat."

When Shredded Wheat is purchased in my home, sometimes I buy it, and sometimes my wife orders it. Shredded Wheat is served at my table at breakfast time. It is brought to the table in dishes, usually with cream and so forth, ready to eat. Very seldom is the package brought to the table. I usually have breakfast first and leave the home. Later on, when the baby gets up, her breakfast is served, and my wife eats with her.

The package is usually delivered on the back porch, where it is brought by me or by the grocery boy. Mrs. Schapansky puts them in their place. When breakfast is served in the breakfast room, it is usually served in a dish as Shredded Wheat.

I very often order Shredded Wheat in a restaurant, where it is served the same way. In one particular case, it was served in a package, cut right before me, very recently, in a little restaurant in Fresno on Van Ness Avenue. I called for Shredded Wheat, and I asked afterwards for the package. He said he had thrown it in the waste basket and I could not take it with me. I saw the package. It was marked "Kellogg's" on the package. It was a regular, small, in-

dividual-size package, like Plaintiff's Exhibit 152. This was approximately a week and a half ago, in Fresno. The waitress got the package right off the shelf in back of the counter; reached underneath and set it on and cut it open, put the biscuits in the plate, and served it with milk, cream, and sugar. At that time I recognized the Kellogg's package. I asked them for it; but he said no, he had already thrown it away and could not give it to me. I did not say anything more; passed it up and just let it go at that. He asked me a question: "Why did you want the package?"

I said: "I am interested in Shredded Wheat. I want to know the difference in the signs." I saw the package. He offered to open another one or sell me a package, but I told him there was no need.

I have had other experiences of a similar nature quite often in restaurants, where I would be served out of the package, never knowing what package it would come out of; and it would be Shredded Wheat to me. On occasions, I have had a biscuit served to me where I never saw the package at all. I was not in a position to know at that time whether the biscuit served were Shredded Wheat or the product of the Kellogg Company.

I cannot tell you, even roughly, how many times that has happened to me, because I do not pay much attention to it. It just happens when I go in a restaurant, what I crave or desire; and I usually order it and forget about it after I am through. But I will say that on an average of once or twice a week I have shredded wheat biscuits in a restaurant. I very seldom see the package, because we usually eat at the restaurant across the street from us now. We either go and sit in a group or we sit at the rear table and converse. The dishes are brought from the back to us with the shredded wheat right in them and ready to

serve, without the package. We never get the package at all, any more.

I have had experience recently in purchasing Shredded Wheat at stores. The other day I went into a grocery store called Black's Package Store, in Fresno. I said to the clerk: "Where do you keep your Shredded Wheat?" He said, "Aisle" so-and-so, "on the center table." That is a self-service store; but I asked the clerk where it was kept. I walked up to that counter, and the first package was one with a little window in it. I looked in there and saw that it was Shredded Wheat. I reached back of it and picked one up, walked right over to the counter. I then recognized that it was the other make, and I went back and exchanged it for Shredded Wheat. It was like Plaintiff's Exhibit 153. The package I picked up was the same package.

The reason I picked up a package like Plaintiff's Exhibit 153 was that, in the first place, there was no Shredded Wheat. This was on special display, possibly featuring it for that particular day. I asked for Shredded Wheat, and he told me that was the place where it was kept. However, on another counter, with all the breakfast foods, etc., the other shredded wheat, the Shredded Wheat as I recognized it, was kept.

When I went through the store after asking where he kept his Shredded Wheat, I went to the table to which he pointed me, and that was the table where Kellogg's Whole Wheat Biscuits were displayed with some other breakfast foods, as specials. There was no shredded wheat on that table, except like Plaintiff's Exhibit 153, which I picked up. I just saw the shredded wheat through the window and reached back of it, because it says on there "Not for sale," and it was just there for display. I reached back and walked up to the counter and started to pay for my groceries. Then I recognized it was Whole Wheat. I said, "I want to ex-

change and get the other." The clerk kind of laughed, and he said, "You seem to be kind of particular what you eat." They know me pretty well in there. I said, "No, it is not that. I just want Shredded Wheat." I walked back and exchanged it and paid the difference.

I went into Reeder's grocery store and purchased and asked for a package of Shredded Wheat. The young lady in the store at the time was very small. Her husband is a good-sized man. He was not there. Naturally, he had the Shredded Wheat on the very top shelf. She said, "Will you help yourself?" I reached up there and took it down. I said, "This is not Shredded Wheat."

She said, "Yes, it is, only in the other package." I took her word for it and walked out with it. The carton, Plaintiff's Exhibit 154, is the one I got at that time. As I reached up to the top shelf, I could not see what I was getting, except that it was either just Shredded Wheat or this food right here. She said, "That is it, right there," and it was the only kind that was in the store. I did not see any other kind on the shelf at all. I did not see any packages like Plaintiff's Exhibit 1, at all.

Reeder's store is on South Second Street, number 532, in Fresno. This took place the latter part of November, 1932. The piece of yellow paper attached to the carton is the cash slip on which I paid for it; and the piece of white paper pasted on there is my memorandum made at the time. That is the conversation that took place.

I was asked to make that purchase of a package of Shredded Wheat by Mr. Weller, the manager there of the National Biscuit Company. He did not say why he wanted it. He is a customer of mine there. He said, "George, will you drive by and get me a package of Shredded Wheat on your way home?"

I said, "Yes, I am off duty at twelve o'clock or so. I will drive by the store and purchase a package of Shredded Wheat for you." He said, "Well, I will be back later and pick it up."

I did not even know that he had Shredded Wheat in his place of business out there. It seemed so peculiar afterwards, why I should go and buy Shredded Wheat, because he was always fooling with us. He would come and ask me to do something on his automobile. It was kind of interesting the way he would do that.

So I purchased that package of Shredded Wheat for him and gave it to him. It did not take very long. When he came in he said, "What took place when you bought this?" I told him approximately what took place. He put it down on a piece of paper and said, "Would you sign that statement that that is true?"

I said, "Certainly. That is what took place; why should I not?" He said, "In that case, then, will you get a sales receipt for me?" I said, "Certainly I can." I said, "I want to get some cigarettes, anyway." So I drove by the store and I asked Mrs. Reeder to give me a receipt. At that time, Mr. Reeder was in. She said, "Mr. Reeder, will you kindly give this gentleman a receipt for Shredded Wheat just like that up there? That is what he purchased a while ago." And he did. He gave me that receipt and I brought it over to Mr. Weller. That is the yellow slip attached to the exhibit.

I have noticed advertising of the Shredded Wheat Company to a certain extent. I have noticed their billboards occasionally, where they have a dish with two Shredded Wheat Biscuits in there, and cream, and a boy ready to eat it, coming up there as if it were for his breakfast, or something to that effect. When I see the dish with two biscuits in it, the only thing I ever think of is Shredded Wheat. The dish on the end of Plaintiff's Exhibit 10 looks similar to the one I refer to as having seen. I do not know how long I have noticed

that. It has only been here in the last year or so that I have paid particular attention to bill-board advertising, for the reason that our company at that time went into it very extensively. Then I began to notice more bill-board advertising than at any time before. I have seen a carton like Plaintiff's Exhibit 10 very often.

If I were to see the package Plaintiff's Exhibit 153 facing me with the sides showing the picture of a dish with two biscuits in it, with the name partially or wholly obliterated, it would bring to my mind Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: Plaintiff's Exhibit 10 is not the package of Shredded Wheat which I have seen right along in the last year. I have seen that for some fifteen-odd years, as far as I can remember back; but I have seen Shredded Wheat packages like that or very similar to it. That is the package with which I am still familiar as Shredded Wheat. Plaintiff's Exhibit 10 is the Shredded Wheat package with which I am now familiar on the market.

Mrs. Reeder I have not known personally at all. I just purchase off and on, here and there, in the neighborhood where I used to work. I know Mr. Reeder only through his son, who used to be junior president of the Chamber of Commerce there and now has had charge of the Fox Wilson Theatre there for a number of years. I have known him quite some time. He is not a friend, just an acquaintance through business. Through him I have known his father who runs this Reeder store. He would drive by my place of business every day with his truck, which says "Reeder's Grocery," a very nice advertisement.

Reeder's grocery is not our regular grocery store; it is just one of the stores I purchase from in the neighborhood where I work. Mr. Weller did not tell me to

go there. He just asked me to purchase a package of Shredded Wheat on my way home. Sometimes I have purchased next door. I do not know which particular place he had reference to. I was on my way; it dawned on me I was to get a package of Shredded Wheat; and I walked into the store and asked for it. Mrs. Reeder met me at the door and talked to me. We conversed a few minutes. I said, "I want a package of Shredded Wheat." She told me to help myself. I reached for it, took it down, paid for it, and walked out.

That afternoon, Mr. Weller came up and asked me if I had made the purchase for him, and I said, "Yes, here it is." He said, "What took place when you purchased this?" He came back later and asked me if I would put it in writing. I told him yes. He took it down, typewrote it out, and put it on the package. I signed it.

Mrs. Reeder said approximately as I have written on there, "That's Shredded Wheat, only it's the other kind," something very similar to that. That is my statement signed by me. It says: "I went to Reeder's Grocery and asked for a package of Shredded Wheat Biscuit. Mrs. Reeder told me to help myself from the shelf, and then I said, 'That is not Shredded Wheat Biscuit, is it?' Mrs. Reeder replied, 'Yes, that's Shredded Wheat; it's the other kind.'" That is just exactly what she said.

I did not know it was the other kind when I took it down from the shelf. I did not pay any attention to it. I never did. I just walked to the shelf, when she said "That is it up there," and I took it down. I never paid any attention to it. I called for Shredded Wheat. She said, "That is it," just pointed it out to me, "right there on top," and I took it down.

I did not make any purchases anywhere else at that particular time, except just that one store. I have purchased Shredded Wheat at numerous other places;

but it has never been called to my attention like it was at that time.

Except for once when my wife bought it and I was not with her so I do not know anything about it, that is the only package of Kellogg's shredded wheat I ever bought. I picked that off the shelf myself, just what she told me. It did not look any different from Niagara Falls Shredded Wheat to me when I took it down off the shelf. She said that was shredded wheat. That is what I wanted.

When she pointed, I did not look to see what was on the shelf, except just what she says, "That's it right there;" and I reached up and took it down; and that was the end of it. I did not look at it, no more than I saw it was the biscuits there, and I recognized that Shredded Wheat immediately, never looking at the name. That was the farthest thing away from me.

I was a grocery clerk approximately a year or a little over, at the E. K. Smith Grocery, Reedley, an independent grocery. I handled Shredded Wheat during that year.

I do want the record to stand, certainly, that, when that woman pointed to that shelf and said "That is Shredded Wheat," I did not see anything there except the plate with the two biscuit in it. I recognized it as Shredded Wheat; by that, I mean a pillow-shaped biscuit shredded out into shreds and put in the form of a biscuit. When I say that I recognized it as Shredded Wheat, I mean I thought those pillow-shaped biscuits made out of shredded wheat were in that carton.

When she pointed out this package of Kellogg's to me on the shelf, there was no window on the package. This was on the shelf there just like that, and I reached up and took it down.

All I saw was just the plate with the Shredded Wheat biscuit. I did not see the name Kellogg's. I did not even look at it, did not even pay any attention

to it. After I got it down, I said, "Is that Shredded Wheat?" Then I did look at the package, and I turned it around a couple of times and walked out with it, after I had paid for it and said no more about it.

When I looked at it, it just seemed like it was just a different package all at once. To my own mind, I said, "I guess they have changed packages and changed the size of their package," never making any statement to anybody.

I did not recognize this Kellogg package. As a grocery clerk, I have handled Kellogg's Corn Flakes. I may possibly have handled other Kellogg products, but I do not recall them now. I never noticed that their packages are predominantly green and red. I do not recognize any family relationship between the Kellogg's Whole Wheat Biscuit package and the Kellogg's Corn Flake package; because the box is so much different than the other one. Kellogg's Corn Flakes is a tall box, and this is a square box, very similar to the Shredded Wheat box. That is the only difference between Kellogg's Whole Wheat Biscuit and Kellogg's Corn Flakes that I recall now, as a grocery clerk.

When I went back to ask for this receipt or bill of sale, I asked for a package of cigarettes, and I asked her if I could have a sales receipt on the Shredded Wheat and the package of cigarettes both. She says, "Yes, certainly," and it was written out. Mr. Reeder wrote it out. Mrs. Reeder asked Mr. Reeder to give me the bill of sale. The only reason I did that was because Mr. Weller asked me to go back and get a bill of sale. I said, "I want the cigarettes anyway; I might just as well get it all at one time." I could have asked them to leave these cigarettes off, as far as that is concerned. It made no difference to me.

I had never had any experience with Kellogg's Whole Wheat Biscuit before that day. I did not even know they were on the market. I really cannot say

how long I have known Mr. Weller. Possibly about six months in the service station business there. I met him one day when he bought a new Pontiac. I do not remember whether he refunded me the money on this purchase. The only written statement I made of the transaction is the one on the package. I did not make a statement to anyone other than Mr. Weller about the purchase of it. I have never had any memorandum taken down as to this transaction. In fact, at the time, I did not even know what it was all about. The only experience I have ever had with Kellogg's Whole Wheat Biscuit is this one instance in the Reeder store. It would be hard for me to say how many instances in restaurants, eating out regularly. I have only had Kellogg's served to me in a carton in a restaurant once.

I have had the Niagara Falls product served to me in restaurants in cartons, in individual packages. That is the way it is served in restaurants. I have never had it served in dining cars in that carton. I do not use diners. The usual way in small restaurants, I would say, is to have the Niagara Falls product or the other product served in the cartons. When, however, you purchase it in a larger restaurant, it always comes in the dish. If I request it, they will have it heated, with cream, or they will serve it in a dish with milk or cream on the side, and I never see the package.

XQ. 143. Is the Kellogg's Whole Wheat biscuit just the same kind of a biscuit that the Niagara Falls Shredded Wheat Biscuit is?

A: I have never recognized the difference.

XQ. 144. You have not noticed any difference?

A. No.

XQ. 145. Then, when they were served outside of the carton, how would you know whether you were being served the Niagara Falls biscuit or the Kellogg biscuit?

A. I would not know; I would think I was getting Shredded Wheat.

THE WITNESS: All the biscuit that have ever been served to me in any restaurant outside the carton have been long biscuit very similar to that in Plaintiff's Exhibit 1.

The only instance where I have been served with the Kellogg product in a restaurant was this one instance in which the little Kellogg individual carton was thrown away. At least, that is when I really began to pay particular attention to it, after I knew that there were two different shredded wheats on the market; and I have naturally watched for it to see if I could determine the difference. The only time I determined the difference was when he opened the carton and I looked at the carton and asked for the carton, but he had thrown it away. He asked me why I wanted it, and I told him to let it go at that. He said he would open another package or sell me a full package if I wanted to. I said there was no need. That occurred quite a bit after the Reeder purchase; only about a week and a half ago. That is the only instance in which I know that the biscuit that was served to me in a plate was the Kellogg biscuit, rather than the Niagara Falls product. The only time I have ever recognized that there was a difference was when I saw the carton. When that Kellogg product was shown to me, I recognized that that was a pillow-shaped biscuit made in the form of shreds.

RE-DIRECT EXAMINATION.

THE WITNESS: I am not able to say at this time that I never was served, outside of the package, any of the biscuit manufactured by the Kellogg Company. About a week and a half ago is the first time I have particularly noticed that the Kellogg Company's Whole

Wheat Biscuit that looked like Shredded Wheat Biscuit was served out of the carton, and that it was different than I had been getting.

I cannot tell at the present time whether or not I was ever served, in response to a request for Shredded Wheat, Kellogg's Whole Wheat Biscuit outside of the carton. I do not know. It might have happened, and I did not know it. In other words, if I had gone into the particular restaurant that we go in to eat, our Shredded Wheat is served to us on the plate, never seeing the carton.

DONALD J. SOWLES.

Deposition taken at San Francisco, California,
February 8, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a tile setter. I did some work for the National Biscuit Company last winter, for a day or two a week through the winter, unloading cars. That is my only connection with the company.

I recognize the package, Plaintiff's Exhibit 1. It is Shredded Wheat. I have been familiar with Shredded Wheat as a consumer about the last fifteen years. I have heard of it and have it in my home most of the time. I have a family of four. We keep house. Shredded Wheat is served at our home. I buy it most of the time and I ask for it as Shredded Wheat.

I eat Shredded Wheat in a restaurant once in a while. About a month and a half ago, in the Hotel Barry Coffee Shop, at Sacramento, California, on Eighth Street, between J and K, I went in and asked for Shredded Wheat. She gave me a package of the Kellogg's Whole Wheat Biscuits. I told her that did not look like Shredded Wheat to me. She said it was Shredded Wheat. I said, "Are you sure that is

Shredded Wheat!" and she said, "Yes." She said, "You know, you have got to take it and shred it all up in your dish, when you eat it." I recognize Plaintiff's Exhibit 154-A as the box that she gave me. The handwriting on one of the inner sides of the carton is not mine. It is, I believe, that of Mr. Minturn, in Sacramento. The date written there refreshes my recollection of the date of the occurrence as being November twenty-third.

I had a similar experience in purchasing Shredded Wheat. I bought some at Anderson's Grocery on Sixth Avenue and Sacramento Boulevard, in Sacramento. I went in and asked the price of Shredded Wheat. That was the first of the conversation. She told me the price of it. I believe the figure she gave me at that time was fifteen cents. I told her it seemed that Shredded Wheat was not coming down any.

She said, "The National Biscuit Shredded Wheat has not come down any, but we have another shredded wheat here, and it has more in the package. That would really be cheaper," and she sold me the Kellogg's Whole Wheat Biscuit for the same as Shredded Wheat. I took the package and turned it in to Mr. Minturn, but I believe he failed to send it in. It was not a package with a window in; but it was a package with a dish with two biscuits in it on each face, like Plaintiff's Exhibit 155.

I have noticed advertising of Shredded Wheat through handling it, through purchasing it. I have seen the picture of a dish, as shown on the end of Plaintiff's Exhibit 10, on packages, ever since I have been buying it, as far back as I can remember. I have also seen the picture of the dish with two biscuit in it on show cards, in the windows and on the counters. If I saw a package with the picture of a dish with two biscuit in it, that would bring to my mind, as it has always, Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: When I received the package like Plaintiff's Exhibit 155, I knew right away that it was a different package from the Shredded Wheat I had been formerly getting. That was the first time that the fact that the Kellogg Company was putting out a whole wheat biscuit was really brought to my mind distinctively. Before that, however, I had had some sort of impression or had heard that the Kellogg Company was making a shredded wheat biscuit, as well as the Niagara Falls concern.

It is fair to say that, since this incident, I know perfectly well that there are two different concerns making these shredded wheat biscuit products; one of them being the National Biscuit Company and the other being the Kellogg Company.

If I should want to buy any more of the Kellogg product, I would have to ask for whole wheat biscuit, I guess, or ask for the Shredded Wheat, and, if I got it, I would turn it down. That is all I could do. I believe I would ask for Kellogg's shredded wheat. If I did, I would expect to get the Kellogg product.

This instance in which I had the Kellogg's biscuit served to me was the only time that I really ever had it served in the carton. I had it once before, and I got the National Biscuit Shredded Wheat. As soon as it was served to me, I recognized it as the National Biscuit Shredded Wheat. I never had any of the Kellogg's shredded wheat served to me before outside of the carton. It has only been three times I have bought it in a restaurant, and once was this morning.

I did that because I was sent by Mr. Weller to make the purchase. He told me to make that purchase in this restaurant that I have told you about. He also told me to go to the California Coffee Shop on Eighth and I. I went there and asked for Shredded Wheat,

and she gave me the Niagara Falls Shredded Wheat out of a large box. I saw the box. She had it in a bin, and I was sitting right alongside of it. She picked it up, took the biscuit, and put them in the dish. It is a little coffee shop connected with the hotel there.

Mr. Minturn explained to me about a lawsuit being on and my being called to testify in this case. I came down to San Francisco alone, at the expense of the National Biscuit Company.

I buy the Shredded Wheat for my family most of the time, and I also buy other groceries for them. The only time that I got the Kellogg product like Plaintiff's Exhibit 155 was the one instance that I referred to. Most of the time I go right to the shelf and get it myself, as I deal more with the Arata Brothers in Sacramento, which is a help-yourself store. I usually buy from them.

Mr. Minturn did not tell me to go to the store where I purchased Plaintiff's Exhibit 155. I went down to the corner from my mother's house, where I had been for dinner at the time I made the purchase. That was at three-thirty in the afternoon. I turned it over to Mr. Minturn about a quarter past four the same afternoon. He did not write. He did not make any memorandum of that transaction. I gave it to him. He said he mailed it down; but I do not know what has become of it. It has been mislaid some place.

Most of the time, when I really go to make a large purchase for my family, I deal with a self-service store. Of course, we deal with the little stores around there. In the self-service store, I walk over to a shelf and take whichever package I want. If I wanted the Niagara Falls package, I would pick that up; and, if I wanted the Kellogg package, I would pick that up.

I have seen Kellogg's biscuit in the self-service stores where I deal. In one of those stores, I saw the Niagara Falls or National Biscuit Shredded Wheat. I

have seen the Kellogg's in several stores. I have seen the Niagara Falls biscuit in pretty nearly all of them. I have seen both the Kellogg's and the National Biscuit Shredded Wheat in most of them. They have both been on the shelves in clear view of anybody wanting to serve themselves, I think, although I just cannot recall that right to the detail. I have noticed both of them in the stores.

The practice in these self-service stores is that you go to the shelves and help yourself and then bring it to the proprietor and pay for it. Everything is arranged within convenient reach of the customer. Some of them furnish baskets, and some do not.

RE-DIRECT EXAMINATION.

THE WITNESS: I asked for Shredded Wheat this morning, and I got Shredded Wheat. I saw the package. It was served in a small package, at Leighton's, right down the street. I do not know just which one it was.

RE-CROSS-EXAMINATION.

THE WITNESS: When I speak of a shredded wheat biscuit, I mean one of these pillow-shaped biscuits made out of wheat in shredded form. That is my understanding of a shredded wheat biscuit. It is fair to say that I now understand thoroughly that that type of biscuit is being made by two concerns, the National Biscuit Company, and the Kellogg Company.

RE-DIRECT EXAMINATION.

THE WITNESS: If I ask for a Shredded Wheat Biscuit, I expect to get Shredded Wheat. If I were given a package like Plaintiff's Exhibit 153, it would not fill my order, not so far as I am concerned, because I have always bought and always got the National Biscuit

Shredded Wheat, and I have always known it as that until this other was put on the market.

RE-CROSS-EXAMINATION.

THE WITNESS: When I take one of these Kellogg packages off the shelf, it is fair to say that I know that I am taking down Kellogg's shredded wheat; that is, a shredded wheat biscuit made by the Kellogg Company.

EARL K. BURKNER.

Deposition taken at San Francisco, California,
February 8, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a salesman employed by the Stockton Paint Company. I have no connection with the National Biscuit Company.

I recognize the package, Plaintiff's Exhibit 1. It is a Shredded Wheat package. I recognize the contents. I have been familiar with them ten or twelve years, as a consumer of them. I purchase Shredded Wheat once in a while and have it at home. I sometimes buy it in restaurants. At home I sometimes purchase the biscuit, or else my wife does.

When we have a package of Shredded Wheat in our home, it is usually served with cream or milk, sometimes with fruit. The package is kept, as a rule, in the kitchen. The Shredded Wheat is served in a dish.

I have noticed advertising of the Shredded Wheat Company in magazines; usually, a picture of Shredded Wheat in a dish with fresh fruit over it, or something like that. I cannot recall it in newspapers or posters. I have never noticed a picture of the dish on the package of Shredded Wheat. Looking at Plaintiff's Exhibit 10, observing the end panel, I have seen that.

When I see a picture of a dish or saucer with two biscuit in it, that brings to my mind Shredded Wheat. When I purchase the item, I ask for Shredded Wheat.

When I ask for Shredded Wheat in a restaurant, it is usually served in a dish, and without the package, as a rule.

I have had experience recently in ordering Shredded Wheat in a restaurant, at Smithie's Coffee Cup, in Stockton, approximately two months ago or three; some time in the fall. I ordered Shredded Wheat, and the waitress served me with Whole Wheat Biscuit; so I called her attention to it. I said, "Hold on; you are not giving me Shredded Wheat." She said, "Oh, yes; I am." I said, "You are not. You are giving me some Whole Wheat Biscuits." She said, "That is all we have. We sell that for Shredded Wheat right along."

So I took it, and I kept the carton that it came in; also took a menu along with me and put it in my pocket. I think I marked the date on the package or the menu, one or the other. The menu card shown me, Plaintiff's Exhibit 156, is, I think, the menu that I took, one just like it.

The carton, Plaintiff's Exhibit 157, is the one in which the biscuit were delivered to me. The slip of paper pasted on there was not done by me. The date on the package, "11/20/32, 8.30 A. M." is in my handwriting. That is the date on which I made the purchase and is my means of identifying the package.

After the conversation with the waitress, I ate the biscuit. As far as I know, that was the only time I have eaten Kellogg's Whole Wheat Biscuit, unless it was served to me at some other time without the package. Shredded Wheat Biscuit is frequently served to me out of a package in restaurants. From my experience in Smithie's Coffee Cup, if, in response to an order from me, a biscuit were served me in a dish with-

out my seeing the package, I do not believe I would be able to say whether it was Shredded Wheat or Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: This was not the first time I ever had any breakfast food served to me in a little package. I have frequently had corn flakes and other cereal products served to me in little individual packages. That is, recently, perhaps, a common practice in restaurants. At any rate, I have seen them in a large number of restaurants, small packages of corn flakes, Shredded Wheat, or other cereals. I think they are usually stacked up on shelves in back of the counter. I have seen the little individual cartons on display. I cannot say that I noticed any difference in the taste of the Kellogg's Shredded Wheat Biscuit, as distinguished from the National Shredded Wheat Biscuit. I saw right away, on the carton, when this individual package was put before me, that it was not the Niagara Falls or National Biscuit Shredded Wheat.

It was because I instantly recognized that fact that I spoke to the waitress about it and asked whether it was a shredded wheat product. I understand that, by the expression *shredded wheat* is meant one of these pillow-shaped biscuits made out of wheat in shredded form. That is the only way I have ever bought it. I never have had Shredded Wheat in any form other than the form of a pillow-shaped biscuit with shreds showing in the biscuit, that I know of.

Mr. Wagner, who is connected with the National Biscuit Company at Stockton, I believe, went with me into this restaurant. Mr. Wagner and I go fishing nearly every Sunday, when the weather permits. We usually get up early and have our breakfast uptown. On this particular morning, he asked me to go into

Smithie's Coffee Cup and have breakfast in there. He said, "I believe they are putting one over on us on Shredded Wheat."

So he told me that Kellogg's were putting out a Whole Wheat Biscuit and they are serving it in some restaurants as Shredded Wheat. I says, "Fine. Let us go in there and find out." That is the reason we went in there.

We both ordered Shredded Wheat; and we both were served Kellogg's Whole Wheat Biscuits. I saved my carton. I saw the carton served to him. I do not know whether he saved his or not. I also took a menu.

The carton was cut open when it was brought to the table. Before Mr. Wagner told me about it, I had not heard of the Kellogg Company making a shredded wheat biscuit. This experience in Smithie's Restaurant is the only one I have ever had with the Kellogg product. I make a practice of eating Shredded Wheat Biscuit frequently. I had ordered it in restaurants prior to that time, especially before I was married. This is the only experience I have had with the Kellogg product.

PATRICK S. BAIRD.

Deposition taken at San Francisco, California,
February 8, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am an accountant. I am not connected with the National Biscuit Company in any way. I know Mr. McDonough.

I recognize Plaintiff's Exhibit 1. I call it Shredded Wheat, with which I have been familiar for twenty-six years. I recognize the biscuit contained in that package. During the time I have been familiar with it, there has been no change in its shape or size.

I purchase Shredded Wheat. I just ask for Shredded Wheat, and I expect to get Shredded Wheat. I have noticed advertising of the Shredded Wheat Company usually in a plate garnished with fruit, as a breakfast cereal, principally in magazines. I have noticed advertising of the Shredded Wheat Company about ten or fifteen years.

I recognize the panel on Plaintiff's Exhibit 10, with the dish. That is what I had reference to when I spoke of a biscuit in a dish. It is sometimes shown in advertisements with fruit and different things on it. I have noticed that dish with the two biscuit in it possibly five years. I cannot recall it longer than that.

If I see a package not otherwise identified, with a plate on it and two biscuits, as shown on Plaintiff's Exhibit 10, that brings to my mind Shredded Wheat.

Shredded Wheat is served in my home. I use it occasionally for breakfast. I am not a family man, but sometimes I board or batch, myself, and make my own breakfast. I also buy it in restaurants, too. When I order Shredded Wheat in a restaurant, it is served either in the package or in the dish. Sometimes I have had it served in the package a number of years ago; lately, in a dish. At the present time, I could not say what is the practice; because I ate in restaurants very seldom for a number of years. I could not recall what would be the general practice. I imagine the dish now, would be my opinion.

I have ordered Shredded Wheat in a restaurant and had it served to me in a dish without the package. That has happened on more than one occasion, not very many. As I say, I do not eat very often in a restaurant for breakfast.

I have had no recent experience in a restaurant or lunch room recently when I ordered Shredded Wheat, except when I went in to get it in connection with this case. I went to the Foster Lunch System at 366 Geary

Street on November 25th, and asked for Shredded Wheat. They brought out a package that looked different from the other package I had been familiar with. I said I wanted Shredded Wheat. She said, "This is Shredded Wheat." I said, "Have they changed the shape of the package?" She said, "This is the only package I have ever seen it come in." So I said, I want to take it out with me.

Plaintiff's Exhibit 158 is that package or one identical with it. I did not make any mark on it by which I could identify it; but it is identical with the name and the size of the package in every respect.

CROSS-EXAMINATION.

THE WITNESS: Mr. McDonough asked me to make this purchase. He told me to go to that restaurant and ask for Shredded Wheat. That is my usual restaurant for lunch downtown, but never for breakfast. He asked me to take whatever they gave me. He did not ask me to go to any other restaurant; but I personally went to two other places, where I got the Niagara Falls product, which was served in the individual cartons. So, of the only three instances that I remember at the present time, in all three it was served in the carton. In two instances, I got the Niagara Falls Shredded Wheat and in the other I got the Kellogg's shredded wheat. One of them was a grocery store and one was a restaurant. Mr. McDonough did not tell me to go to that grocery store. I went of my own accord. I asked for Shredded Wheat and got the Niagara Falls Shredded Wheat.

Those are the only three instances I recall where I made any effort to get evidence for this case. This one instance, in which I received the Kellogg's shredded wheat product in the little carton, is the only instance I recall, the first instance of any experience with the Kellogg product. That was the first time I had ever heard of the Kellogg Biscuit.

It is safe to say that I now understand thoroughly that there are two makes of shredded wheat on the market; one of them made by the National Biscuit Company, and the other made by the Kellogg Company.

If I wanted the Kellogg Biscuit in the future, I would ask for it by name, as Kellogg's Shredded Wheat. Mr. McDonough was not with me on any of these occasions; but I did this at his request and then reported to him.

RE-DIRECT EXAMINATION.

THE WITNESS: If I were asking for Shredded Wheat and wanted to get Shredded Wheat I would just ask for Shredded Wheat. I would not specify any name unless I wanted this particular make of Kellogg's. If I wanted to get the whole wheat biscuit—well, I do not know the difference. Shredded Wheat is Shredded Wheat, to me.

RE-CROSS-EXAMINATION.

THE WITNESS: If I wanted the Kellogg product, I would now say Kellogg shredded wheat, or Kellogg biscuit. Formerly, I would not. Before talking with Mr. McDonough, I did not know that the Kellogg Company was making a shredded wheat biscuit; but I know it now.

ARNOLD MACCOOL.

Deposition taken at San Francisco, California,
February 8, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a 1932 graduate of the University of California. I recognize the package, Plaintiff's Exhibit 1, as a box or carton of Shredded Wheat. I have been familiar with Shredded Wheat ever since I can remember eating anything. I have had it at home all my life, as far as I can remember.

When it is served at home, we usually help ourselves out of the box. It is not brought on the table in a dish without the box. It is our custom to help ourselves when we want it.

I have seen advertisements of Shredded Wheat, usually displaying the biscuit in a plate with fresh, seasonable fruits; on posters, as a rule. I have also seen it on a package. I recognize Plaintiff's Exhibit 10. The dish shown on the end of that package would be the same, without the fruit, I could not say how long I have been familiar with a package like Plaintiff's Exhibit 10, but I remember it. I just took it for granted; that is all. If I see a package or a carton not otherwise identified, with a picture of a dish and two biscuit, that brings to my mind Shredded Wheat.

I buy Shredded Wheat, asking for it by the name, Shredded Wheat. When I ask for Shredded Wheat, I expect to receive Shredded Wheat. When I asked for Shredded Wheat, I expect to get the brand. I happen to know that there are other similar products. I know that Kellogg has a Whole Wheat Biscuit out.

When I asked for Shredded Wheat, if I am handed a package like Exhibit 153, that does not fill my order. I have recently had experience in purchasing Shredded Wheat, asking for Shredded Wheat in a store. I do not remember when it was. I do not remember where

the last time was. We usually trade with the chain stores in the neighborhood.

Last November, about the middle of the month, I went into a grocery in Berkeley, twenty-three hundred and something. I have forgotten the name of the store. I asked for Shredded Wheat, and the man repeated the name Shredded Wheat after me. He went to his shelf where he has packages grouped and handed me a package of Kellogg's Whole Wheat Biscuit. I asked him if they had changed the name recently. He said no, that this was the same article, that he did not handle Shredded Wheat because he could not sell it. He was quite emphatic that this was the same and that I should be just as well satisfied with it. I took the package. Plaintiff's Exhibit 159 is the package.

CROSS-EXAMINATION.

THE WITNESS: I did not buy the Kellogg product at any other store. I asked for Shredded Wheat in other stores and always got Shredded Wheat. I went to half a dozen other stores. In every one I got the Niagara Falls Shredded Wheat like Plaintiff's Exhibit 1. In just the one store I got the Kellogg product. Mr. Dave Gill, the manager of the Oakland agency of the National Biscuit Company, asked me if I would mind going to these six stores and asking for Shredded Wheat.

At the one store where I got Kellogg's biscuit, the man was quite emphatic in telling me that that was the same product or the same kind of product, but made by another manufacturer. He did not mention it was made by Kellogg's until I asked him, until I noticed the name itself. He said it was just the same kind of product but made by somebody else, and he was quite emphatic about that. He said, "It is the same darn thing." He repeated that continuously; he was very slangy in his expression.

Later I opened the package and looked at the contents of it. It was my first experience with it. I knew nothing about it. When I speak of Shredded Wheat Biscuit, I mean a biscuit in pillow-shaped form, made out of wheat drawn into shreds and put into biscuit shape. Except as to size, the Kellogg product looked like a biscuit made out of wheat in shredded form and put into a pillow-shaped biscuit, very similar. I did understand what the grocer meant when he said it was the same kind of a product made by somebody else, "the same darn thing" made by Kellogg's, as I pointed out to him. That was the first experience I had with the Kellogg product.

I do not think Mr. Gill, of the National Biscuit Company, told me anything about the Kellogg product when he asked me to make the purchases. He told me he was going to ask me to testify in this case, and to see if anybody would try to substitute Kellogg's brand for the Shredded Wheat.

It is fair to say, that he had told me about the Kellogg Company having a shredded wheat biscuit on the market before I actually saw one of the packages. He said he wanted me to go to this store to see whether anybody was trying to substitute that for the National Biscuit product. I do not believe he said anything about the case, because I did not know at that time just exactly what he wanted. I knew they were trying to get evidence to the effect that substitution was being done. Other than that, I knew nothing about it, nor did he tell me. I do not think he knew very much about it himself. That was my only experience of any kind with this particular Kellogg product.

It is fair to say that, since that experience, I know and realize perfectly well now that shredded wheat biscuit are being made by two different concerns, the National Biscuit Company and the Kellogg Company. I did not try any of Kellogg's biscuit.

I am working for the National Biscuit Company at present, as bench boy in the packing department, general helper, in the San Francisco plant. I have been there about a month today. The San Francisco plant is a cracker plant of the National Biscuit Company. I do not work in their Shredded Wheat plant. They have a Shredded Wheat plant in Oakland. I have never been in it. The six stores I went to are all independent stores, separately owned, as far as I know.

RE-DIRECT EXAMINATION.

THE WITNESS: In November, 1932, I was not employed by the National Biscuit Company. I started the twelfth of January.

MRS. JESSIE M. FATJO.

Deposition taken at San Francisco, California,
February 8, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in the real estate and insurance business at Santa Clara and at San Jose. I keep house for the folks and the children. My family consists of my husband's mother and father and my two children and myself. I am not connected with the National Biscuit Company in any way, neither was my husband during his lifetime.

I recognize Plaintiff's Exhibit 1, a package of Shredded Wheat. I recognize the contents. I naturally call it Shredded Wheat. I have been familiar with that item, I would say, about twenty years. When we were in the grocery business, naturally we sold Shredded Wheat, you know. My husband's family have been in the grocery business ever since 1848. They

are not in the business now; but, up until 1926, they continued in the business, one to the other. That is, the family carried on the business from one generation to the other; and Shredded Wheat was carried in their store. I have been in the family fifteen years. The whole time I was there I have seen it.

The expression Shredded Wheat represents to me the National Biscuit Shredded Wheat, which we have for breakfast. I serve it to the youngsters at home almost every day. I try to change the form of it. One morning I heat prunes and put them over the Shredded Wheat. Other mornings I change, possibly, to apricots or whipped cream. We have even tried lately poached eggs on top.

I take the Shredded Wheat out of the package before I serve it. When the youngsters are served separately, when they go to school, I take a couple out of the package and put it on the plate.

I have obtained Shredded Wheat at different times in restaurants, when I have had the children with me. I do not particularly eat it myself. The children always ask for "that box". They get a small box with two in it, one each for them, as a rule, or sometimes they each get a box. At different times the children have had it without the box, in restaurants, whenever I bring them to the city or take them away from home.

I purchase it at stores, also, I just say "Shredded Wheat." Sometimes I ask for it over the telephone. When I ask for Shredded Wheat, I expect to receive Shredded Wheat.

I asked for a package of Shredded Wheat at Miller's Station, Miller's store, which is on the road from Cupertino to Saratoga. They gave me Kellogg's package. It did not look quite familiar to me, so I asked the woman, "Is that Shredded Wheat?" and she said, "Yes." I had never seen the Kellogg package before, so I glanced at it—I have been so accustomed to get-

ting Shredded Wheat—and said, "Is that Shredded Wheat?" and she said, "Yes, it is." So I took the package. When I started home, I noticed it was not. Plaintiff's Exhibit 160 is the package I purchased on that occasion. There was a figure 13 on the package when I got it. The yellow slip clipped to the package is the purchase slip that was given to me at the same time.

This took place on November 25th, in the afternoon. I did not particularly inspect the package at the time I bought it in the store. I just glanced at it and saw a biscuit on it. I have been accustomed to seeing a biscuit on Shredded Wheat, the picture of a biscuit. I said, "Is that Shredded Wheat?" I thought maybe they had changed their package. She said, "Yes," so I took it. When I got out in the machine, I put it in the back, and the youngsters said, "Mama, this is not the kind of Shredded Wheat we have been accustomed to getting." So I looked at it, and then, I recognized it was not. That was my first knowledge that it was not Shredded Wheat. I had no idea anyone else had more or less the same package. When I looked at the package in the store, I did not read the name Kellogg on it. I just saw the biscuit, the wheat biscuit, and then I thought that is what it is.

Prior to that time, I had seen advertising of the Shredded Wheat Company. I have helped put up displays at the store quite frequently. I have always noticed on Shredded Wheat the long biscuit at the bottom of the package, the picture on the face of Plaintiff's Exhibit 1. Looking at Plaintiff's Exhibit 16, I had seen the biscuit and the plate. We had some display cards at the store with that. We used to make up our other part of the display. If we had any children in any pictures, we would put it behind that.

Those displays were furnished us by the Shredded Wheat Company or by the National Biscuit Company.

It seems to me that I recall seeing advertising of Shredded Wheat in a dish like that almost the whole time I have been in the store helping.

If I saw any carton not otherwise identified, like Plaintiff's Exhibit 153, with two biscuit and a dish on the outside of it, that would naturally bring Shredded Wheat to my mind; because I know, when I took that package, I just glanced at it and saw the biscuit. I thought I had Shredded Wheat.

We had some relatives living across from the Shredded Wheat factory in Oakland there. I used to visit them. I know it is also made in Niagara Falls, by the Falls on the box.

I just ate a couple of Kellogg Biscuit out of this package I bought that day. We tried them. I noticed there was a little difference in size between the Shredded Wheat biscuit and the Kellogg biscuit, although the biscuit itself is almost the same thing. I do not know whether I could tell them apart by the taste. We have been so familiar with Shredded Wheat, I think I could, because one is a little larger than the other.

CROSS-EXAMINATION.

THE WITNESS: I did not know anything about the Kellogg Company putting out a wheat biscuit at all, until I bought that package. I have always been fond of Shredded Wheat, and we have always eaten it as youngsters. I serve it to the folks quite frequently. I seldom eat breakfast at all. You have to give little children a change of any breakfast cereal. I do not care what it is. They tire of the same appearance every day. We have always done that with all food for the children. We change off, occasionally to mush. We usually stick to Shredded Wheat. We always have it in the house. Sometimes we feed them poached eggs. As to cereals, the only two that we know anything about in our house are Shredded Wheat and mush.

Of course, we have been in business. I know about other cereals from being in business. In our own house, we have never handled anything but mush and Shredded Wheat, particularly.

The only way I have ever heard of Kellogg's Corn Flakes is through the grocery business I was in. The youngsters never seemed to take to Corn Flakes. I know my sister's children have it quite frequently. My children never seemed to take it. We never serve any other cereal but mush and Shredded Wheat. I do not know that the children get tired of either; but we have always tried to give the children a change of food. We change back and forth from Shredded Wheat to mush and mush to Shredded Wheat. Sometimes we serve them eggs or different foods. As far as cereals are concerned, we have not had many cereals.

I have never worked in the grocery store. At night, the folks took care of the children, and my husband and I went down to the store and got it ready for Saturdays and special days, put up displays ourselves, and things of that kind.

XQ. 84. Did you not say, in the beginning of your testimony, that, when this woman handed you the package of Kellogg's Whole Wheat Biscuit, you noticed something different about it and asked her whether it was Shredded Wheat?

A. Well, I just glanced at the package and I saw the biscuits, and I thought—I do not know exactly what I did see. I thought I saw the plate on the front; but I did not pay particular attention, because I was on my way to Saratoga.

XQ. 85. You were led by something about it to ask the woman whether that really was Shredded Wheat?

A. Yes, I said—well, I just noticed a little change, somehow or other; and I says, "Is that Shredded Wheat?" and she said, "Yes," and I thought, well, there is the biscuit; I have it."

THE WITNESS: When I got in the car, the children read it and said that was not the kind, because they saw the whole wheat on it and it was not Shredded Wheat.

I was asked to make that purchase by Mr. Wadwitz, the manager of the National Biscuit Company in San Jose, whom I have known about a year. During all the fifteen years I have known of this shredded wheat product, the name Shredded Wheat has always meant the National Biscuit Shredded Wheat to me. I was familiar with it and I knew it.

Mr. Wadwitz knows that I tried to sell real estate and write insurance. He phoned me and said, "Are you going anywhere near Saratoga?" It just so happened I was the next day. I said, "I have to see Mr. Boyce in Saratoga." He said, "If you will pick me up a package of Shredded Wheat at this station," and he mentioned the station. I said, "I will do that." He said, "Bring it back to me when you get it." That is all I knew about it. I had no idea there was anything more to it. He just asked me to pick up Shredded Wheat at that one place.

The only experience I ever had with Kellogg Whole Wheat Biscuit was just that one place. That is the only place I know of. When I have seen Shredded Wheat in restaurants, it has been served in individual packages, and it has always been the National Biscuit Shredded Wheat. I have never gotten anything different in restaurants, that I know of. When I came back from Saratoga, I took this package to the National Biscuit man.

GEORGE J. BORN.

Deposition taken at San Francisco, California,
February 8, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in the retail grocery business. I own just one store. I have been in the business about thirty-one years and have had this same store all that time. I was connected with the grocery business fifteen years before that, so I have been actively connected with the business for more than forty years.

I recognize Plaintiff's Exhibit 1. It is Shredded Wheat. I have been familiar with that Shredded Wheat about thirty-eight years. I have carried it in my store or in the stores with which I have been connected, all that time. I think that is nearly ever since it was first made: I first became familiar with it at Pittsburgh, Pennsylvania. I was visiting the Pittsburgh Exposition there. The boss brought it home after an evening there. We all thought it was kind of funny to be eating hay or straw, as we called it then; but we soon began to like it. I think we did not stock it in the store for about three months after we became familiar with it. We have had it ever since that time.

The sales of Shredded Wheat have increased since we first put it in. We sell about five dozen a month now. It has become easier to sell all the time, especially where there are children in the family. I like it so well myself that I think adults like it about as well as children do.

I have observed the advertising done by the company. In my opinion as a merchant, I think that advertising has had to do with the increase in the amount that we turn over. I do not think the appearance of the biscuit through the years has changed at all. Sometimes I think there is a slight change in the package, the cut on the package, but not the biscuit itself.

When our customers ask for this product, they ask for a package of Shredded Wheat. When I am asked for that, I give them Shredded Wheat, referring to Plaintiff's Exhibit 1. I never have given them anything else when Shredded Wheat is asked for. I recall seeing in the advertising a picture of a dish on the end of the panel in Plaintiff's Exhibit 10, and I recall the use of that package. Without a change, I think that must be twelve years or more that they have had that. I have seen it, also, in other advertising of the company during that period, on cuts and placards, also in newspaper and magazine advertising.

From my experience in grocery merchahdising and dealings with the public, as to whether this expression Shredded Wheat has any particular association or meaning in the minds of the general public, I think that, in most people's minds, there is only one Shredded Wheat. Nothing else will take its place. It is like Palmolive Soap or Dutch Cleanser that we sell. Those names refer to particular makes of soap and cleanser. I regard Shredded Wheat as a trade name. I guess I mean by that, if people ask for Shredded Wheat, they want Shredded Wheat only.

CROSS-EXAMINATION.

THE WITNESS: Besides Shredded Wheat, we carry a general line of cereals, mostly all the advertised cereals. We carry all the wheat flakes and prepared bran and raw bran, and Wheaties and Puffed Wheat. I do not think the newer cereals have affected Shredded Wheat very much, in my observation. I have not noticed any change in the demand for Shredded Wheat in my store. It is true, however, that the customers of a store shift around. Most customers change from one cereal to another; and to some extent it is also true, I think, that, unless a product is constantly advertised, it

would soon lose its old demand; it would soon lose the old customers and not be getting any new customers unless the advertising was kept up.

I do not think we ever have had a demonstration of Shredded Wheat in our store. I am familiar with what is known as a demonstration. We carried Kellogg's Whole Wheat Biscuit at one time. We do not carry it at the present time. I cannot say that I have seen any of the advertisements of the Kellogg product. I may have. I think we first handled Kellogg's shredded wheat around five years ago or less; maybe three or four years ago. It is fair to say that, since that time, I have known that there were two concerns making this product, the Niagara Falls Company and the Kellogg Company.

When I was carrying the Kellogg product, if a customer asked for Kellogg's Shredded Wheat, I would give them the Kellogg product. When most customers ask for Shredded Wheat, they do not usually say Shredded Whole Wheat Biscuit; they usually say Shredded Wheat. Shredded Wheat has no other current name, as far as I know, than the words Shredded Wheat. Uneeda Biscuit is a soda cracker; but I do not know any other name for shredded wheat or shredded wheat biscuit than the words Shredded Wheat or Shredded Wheat Biscuit. I should say Shredded Wheat is only Shredded Wheat. That is all I have calls for. I would understand a shredded wheat biscuit to be the Shredded Wheat Biscuit that we have known so long.

I do not think it is physically possible for any other maker to make that shredded wheat biscuit than just this one concern at Niagara Falls, if he tries to sell it for Shredded Wheat Biscuit. You can make an article similar to it. If you do not use "Shredded Wheat Biscuit," I would think it would be all right.

If a manufacturer made that product, I do not know any other name that would describe it than the words shredded wheat or shredded wheat biscuit. I would not know what else he would call it. If it were made out of wheat shredded and put up in that pillow-shaped form, I do not think it would be a shredded wheat biscuit. It would not be Shredded Wheat, because Shredded Wheat is Shredded Wheat. I could not suggest any other name by which it could be described. I would not know any other name than shredded wheat biscuit. There was one put on the market not so long ago, called Muffetts. That was not called Shredded Wheat. I think Muffetts are shredded, all right. I know some people make it out of a flat pressed wheat berry and call them whole wheat biscuits. I know a product called Triscuit. That is compressed shredded wheat.

RE-DIRECT EXAMINATION.

RDQ. 67. Why did you cease carrying Kellogg's Whole Wheat Biscuit?

A. Well, we could not seem to keep it fresh. We tried to sell it for a while, but were unable to sell it fast enough to keep it fresh. And then the confusion of the people in wanting Shredded Wheat, and they did not know which to take, so we eventually cleared it up by carrying only one brand.

RDQ. 68. Did you find there was confusion on the part of your customers?

A. Yes, there was.

RE-CROSS-EXAMINATION.

THE WITNESS: Ours is not a self-service store. It is arranged for self-service, but we have been a service store so long that people do not help themselves much in our store.

Mr. Vandervoort, a member of the attorneys for the National Biscuit Company here asked me to testify

in this case. I also know the Sacramento distributor, the agency there. I did not know Mr. Vandervoort before he asked me to testify. He is to pay me for my trip. He asked me whether I was still handling Kellogg's Biscuit and I told him I was not. I came over here by myself.

We did not consider the Kellogg brand as Shredded Wheat. We tried to sell it as a cereal, but it did not sell fast enough to keep it fresh. It had rather limited advertising at that time. I do not know just what it has now. We did not associate it in our minds as being Shredded Wheat; and we could hardly persuade our customers that it was the same thing when we tried to sell it.

While I do not know that the matter ever came up during the time we were handling the Kellogg product; if a customer had asked me whether there was any other make or brand of Shredded Wheat besides the Niagara Falls brand, I would say that there was only one Shredded Wheat and we could not conscientiously sell the Whole Wheat Biscuit as Shredded Wheat. If it was put direct to me, I think I would explain that Shredded Wheat was the only Shredded Wheat. I would not use the expression that Kellogg's was another make of shredded wheat. I would not even say that shredded wheat or shredded wheat biscuit were being made by two manufacturers: one at Niagara Falls and the other at Battle Creek. I would simply tell the customer that, as far as I know, there is only one kind of Shredded Wheat on the market, the Niagara Falls product.

If the customers told me they had seen some of the Kellogg product and it looked like Shredded Wheat and tasted like Shredded Wheat, I would not tell them they had not seen it; but I would tell them it was not Shredded Wheat; meaning by that that it was not Shredded Wheat anyway. I have no doubt it is made

of wheat. I do not know whether the Kellogg product is shredded. We do not call it Shredded Wheat. I am familiar with the Kellogg Biscuit. I always thought it was just a trifle finer shreds than the Niagara Falls Biscuit. It is very little smaller; at least, it was when I sold it. I am not sure if it has the same number of biscuits in the carton as the Niagara Falls product. I think it did have a larger number of biscuits.

I have not talked about the case with anybody besides Mr. Vandervoort, except my brother, that I was coming down here. He is my partner.

When I speak of shredded wheat, I mean a product made by the National Biscuit Company at Niagara Falls or at Oakland. It is not impossible for me to conceive that the same product could be made by another company at another place. I do not think I would look at it that way. I think they could make a biscuit if they did not call it whole wheat biscuit or shredded wheat and make it so much alike. The name whole wheat biscuit does not mean to me the same thing as shredded wheat biscuit.

There are not half a dozen different products you could call whole wheat biscuit. I think the Sanitarium Health Food Company made one here some twenty years ago, I guess; and they pressed the whole wheat berry into a flat-like oat flake and baked it. I forget, now, whether it was exactly square; but they did not call it whole-wheat biscuit. They called it Sanitarium Biscuit, I think.

This product in Plaintiff's Exhibit 1 is shredded whole wheat biscuit. That is the same thing that we have always associated with the name shredded whole wheat biscuit.

If a customer asked me for whole wheat biscuit, or Kellogg's Whole Wheat Biscuit, I would say I did not have it. I would not sell the other product as the same product. I think I should tell her that we had shredded

whole wheat biscuit. I do not believe I would try to tell her it was the same article as Kellogg's. I might say it was made out of the same material. I think I would say it was made out of wheat and water.

My brother did not come down with me. The Pittsburgh Exposition that I spoke of was always held in the fall; but I could not say whether it was exactly thirty-eight years ago. It was very early in the history of my recollection of Shredded Wheat. I am just guessing about the length of time. I think it was made before I became familiar with it. I thought it was nearer forty years ago that it was made; but Mr. Vandervoort said it was about thirty-eight years. I sold it just as soon as it was introduced in Pittsburgh. It may only have been thirty-seven years.

RE-DIRECT EXAMINATION.

THE WITNESS: At the Pittsburgh Exposition they had a little machine that showed the process. They put in the wheat berry and brought out the shreds, the same as they used for a good many years afterwards, just about the same kind of apparatus. At that time, it was something new. It was quite a long time ago. I remember it as something that was then being newly introduced.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not remember whether, in the beginning, their idea was to sell the machine and have people make the shredded wheat at home or not. From the table it stood on, the machine was probably about two to three feet high. They put the wheat in on top.

I think it was about three months after that time that we began carrying it in regular package form. The man I worked for, Frank Steinberg, brought home a package. I do not know now whether it was a sample package or regular package. They used to put across

the package: "Tell me what you eat and I will tell you what you are." He ridiculed that phrase and said, "I can tell you what you are without eating that stuff." That phrase naturally stuck in my mind. They discontinued it a long time ago. It was on some of the old packages.

I remember seeing the picture of a woman, the Goddess Ceres, with a sheaf of wheat, on the old packages. I think I remember seeing that on packages up to ten or fifteen years or so ago. I strongly associate Niagara Falls with this National Biscuit Shredded Wheat Biscuit. In fact, I thought it was made there first, but it may not have been. Mr. Vandervoort did not say anything about its being made anywhere else. Of course, I knew they had a branch in Berkeley or Oakland. In all their advertising, Niagara Falls has been very prominently featured. I never have had anybody ask for this article, except by the words Shredded Wheat. If anybody asked me for Niagara Falls Shredded Wheat, I would have no doubt what they meant. Then, of course, I should hand out Shredded Wheat. I carry the rest of the National Biscuit line in my store, their cracker line. We handle a great variety of their line. I handle the rest of the Kellogg line, excepting only the shredded wheat biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: If anybody asked me for a package of Shredded Wheat, I would have no doubt in my mind what they would want.

RE-CROSS-EXAMINATION.

THE WITNESS: If they asked for Shredded Wheat, I would never give them anything except the Niagara Falls product.

WILLIAM G. EASTMAN.

Deposition taken at San Francisco, California,
February 8, 1933.

DIRECT EXAMINATION.

THE WITNESS: I operate and own a grocery store in Stockton, known as the Eastman Cash and Carry. I have been in that business thirteen years, always in Stockton.

I recognize the package, Plaintiff's Exhibit 1. I call it Shredded Wheat, original Shredded Wheat. I recognize the contents. I have been familiar with Shredded Wheat like that for some time. The moment I went into the grocery business, I was familiar with it. I used it in my home for quite a few years before that. During my experience with it, it has always been of substantially the same appearance as the biscuit in Plaintiff's Exhibit 1.

I have seen Shredded Wheat advertised a great deal. I do not recall having ever seen a package like Plaintiff's Exhibit 10, with a picture of two biscuit in a dish on the end of the carton. I have seen that dish, however, in advertising of the Shredded Wheat Company. I carry Shredded Wheat in my cash-and-carry self-service store. My customers come in and help themselves to what they want. Sometimes, when strangers come in, we wait on them. Ordinarily, they wait on themselves.

When a customer orders Shredded Wheat, I know she has the original Shredded Wheat in mind, Plaintiff's Exhibit 1. When a customer asks for Shredded Wheat, I supply her with the original Shredded Wheat, the National Biscuit Shredded Wheat. From my experience in dealing with the public, I am able to say whether the expression Shredded Wheat has a definite meaning or association in the minds of the public. When they

ask for Shredded Wheat, they expect to get the original Shredded Wheat, in my mind, by which I mean the Shredded Wheat with the Niagara Falls picture on it. The public feels that way about it through the picture on there and the advertising it has had. I would say that the advertising I have seen done by the Shredded Wheat Company and the National Biscuit Company has had a great effect on the public. They look for that package, the original Shredded Wheat. The name Shredded Wheat has a great influence on the public, the original Shredded Wheat name.

If a customer asked for Shredded Wheat, I would never give her anything else than a package like Plaintiff's Exhibit 1. In my experience and in my opinion, I do not think the public think of any other product or the product of any other person when the expression shredded wheat is used.

I have seen advertising where it was "Shredded Wheat" in large letters, and then "Kellogg's" in small type, in the Stockton paper, within the last three or four months. I think that sort of advertisement is a very misleading thought to the public. It was misleading to me. I read it, and I approached the Shredded Wheat salesman on the price he had it advertised for, which I think was eight and one-half cents. He said it was not advertised. I was so positive about it that he said no, it was not. I said, "I am positive." He looked the paper up and said it was Kellogg's Whole Wheat Shredded Wheat that was advertised. Up to that time, I really thought it was the other. I was so positive about it, and my clerk was also positive; but he looked it up and said it was Kellogg's Shredded Wheat that was advertised.

CROSS-EXAMINATION.

THE WITNESS: I knew that the Kellogg Company did not make the original Shredded Wheat. When I

saw "Shredded Wheat, Kellogg's," I did really think that meant Niagara Falls Shredded Wheat. I did not read far enough down. The "Shredded Wheat" was what confused me and what misled me so much I did not read on down. I took it up with the salesman and he told me the word *Kellogg's* was there. That was the advertisement of the Green Frog Food Emporium in Stockton, which was advertising Kellogg's Shredded Wheat, at eight and one-half cents.

I do not now stock Kellogg's Shredded Wheat. I have stocked it, but I do not any more. Mr. Wagner, the manager of the National Biscuit Company at Stockton, asked me to come down here and testify in this case. I came down on the train. He told me I would be paid for my time in the case. I expect to get a check when I go out of here.

I handle other Kellogg products, the Corn Flakes, and Kellogg's line, a good many of the articles, except Shredded Wheat. My store is operated now as a self-service store. The customer comes in and goes to the shelves and takes down what she wants. It has been self-service for five years, and was service before that.

Up until five years ago, whenever a customer asked for Shredded Wheat, we gave her the Niagara Falls product. Since then, the customer goes to the shelf and takes whatever she wants, if it is there, unless it is a stranger or one of the few who do not prefer to wait on themselves. So far as my store is concerned, for the last five years, with the exception of very few customers, they wait on themselves, do not say anything to me, do not ask for anything; they go and get what they want.

Something I have never done was to substitute. I handled the Kellogg product, and there was very little sale for it. I handled it when it first came out. If a customer asked for Shredded Wheat and I sent her something other than the Niagara Falls product, I

would expect her to send it back, depending on if she was that kind of customer. Sometimes they keep them and sometimes they do not. Sometimes they do not care what they get.

In my store it is the hardest thing in the world to put over something new. They seem to hold to the old. In my particular store, new cereal products do not sell very rapidly. There are some exceptions, I will admit. I believe advertising is a great thing, but it is hard for me to answer as to whether the Shredded Wheat business would die out if they discontinued advertising. I would not like to commit myself on that. I had not thought anything about discontinuing advertising. That they always keep up advertising has, I think, a significance to me.

We have had demonstrators there in the store. Those demonstrators have been trying to introduce new products or introduce old products to new customers. I do not think I would need a demonstrator in there to tell an old customer about Niagara Falls Shredded Wheat. I never had any demonstrators of the Kellogg's Shredded Wheat Biscuit.

I do not know how long ago I stocked Kellogg's Shredded Wheat. I do not know how long it has been on the market. I stocked it, I think, when it was first put on the market. I distinguish one of these products as the original Shredded Wheat and the other as Kellogg's. I have known for about five years that the Kellogg product was on the market in competition with the Niagara Falls product.

I handle Wheaties and Albers Wheat Flakes. The Wheaties are Sperry Wheaties, made by the Sperry Flour Company. They sell very slowly in our store. That is no go.

If a customer asks me for Corn Flakes, I generally understand that as being a particular product or brand, Kellogg's Corn Flakes. If a customer just said "Corn

Flakes," I suppose I would give them Kellogg's. It depends, sometimes, on circumstances. There is only one brand of Corn Flakes, I think. I have Post's, but they are not called Corn Flakes. They are Post Toasties. I think I did handle corn flakes other than Kellogg's or Post Toasties, but it was a good many years ago and I have forgotten the brand. I do not handle it any more.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not carry Kellogg's Whole Wheat Biscuit because the sale was not great enough on them for me to handle them. At that time, we were operating as a self-service store, and the customers just did not take them. I had Shredded Wheat in the store at the same time. I have always had Shredded Wheat, ever since I have been in business.

RE-CROSS-EXAMINATION.

THE WITNESS: In 1927 or 1928, when we had both products, Kellogg's and the Niagara Falls, while we were still a service store, a customer would specify if she wanted Kellogg's. We have not carried Kellogg's biscuit since we became a self-service store.

W. D. VAN ARSDALE.

Deposition taken at San Francisco, California,
February 8, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am manager for L. Hart & Son Company, a department store in San Jose. One of about forty different departments is a grocery department. I have charge of the grocery, the crockery, and the toys. I have been manager of those departments

for seven years. I have been in the grocery line indirectly for about thirty years, and, directly, about nine or ten years in direct charge of groceries. I have been in the crockery and glassware, directly next to the groceries and monkeyed a lot with that, too. It is true that I have been more or less familiar with the grocery line for thirteen years or more.

L. Hart & Son Company is a service store generally, but the grocery department is self-service. I have been connected, indirectly, with the Schaffer Company, at Modesto, who have two departments, service and non-service. L. Hart & Son Company do accept a very few orders over the telephone for groceries.

I recognize Plaintiff's Exhibit 1, and I recognize the contents, as Shredded Wheat. I have known Shredded Wheat since long before 1900. My wife's father was a fiend on Shredded Wheat. He used to eat it with milk and poached egg. I do not remember having it in my home; but that was in my wife's father's home, I saw it and knew about it at that time. It then looked like the present product, as far as I can remember. I do not think there has been any change in shape or appearance.

I recall Shredded Wheat advertising. I think almost every magazine that I have picked up has had a Shredded Wheat in, as far as I can remember. I used to be in the advertising business and have watched advertising a great deal for ideas. When I pick up a magazine, I usually read all the ads, in consequence. I have frequently seen ads of Shredded Wheat. In my opinion as a merchant, I think the effect of the advertising done by the Shredded Wheat Company through the years on the public has been to stimulate the sales of that particular product. The effect on the name Shredded Wheat has been that they come in and ask for Shredded Wheat. My customers ask where

the Shredded Wheat is. We do not serve them there in the store. If they ask where the Shredded Wheat is, we direct them to the section where it is.

When I use the expression Shredded Wheat, I mean only one thing by that. Our cereals are all together; and, if they would ask for any particular cereal, we would direct them to that particular part of the store. If a telephone order comes in for Shredded Wheat, we fill that order with Shredded Wheat. We do not substitute anything in the store.

I recall the package like Plaintiff's Exhibit 10, with the picture on the end. I have seen that dish. I would not be able to say how long I can remember having seen the use of that dish with two biscuit in it, because that package, to my recollection, has been the same ever since I can remember selling Shredded Wheat off the shelf, with the exception of possibly a few little changes in lettering or style.

When a customer asks for Shredded Wheat, he means that particular package. I would certainly say that the public associates the name of Shredded Wheat with this product.

In our grocery department, we set all our cereal products together. All the dry cereals that come to us already cooked ready for eating are kept together, relative to one another. The farinas and cooked mushes are all kept together. We keep corn flakes one right by the side of the other. We keep our farina, cream of wheat, pearls of wheat and Sperry wheat hearts all in one section by themselves. We do that to facilitate the customer in getting what she wants quickly without any confusion.

We carry Kellogg's Whole Wheat Biscuit next to Shredded Wheat, in the same bin, the same part of the store, the same section, with a little partition in between. In the Kellogg's packages we have at present, there is a cellophane display package, just one

in each case. That is our present stock. That package is like Plaintiff's Exhibit 153. That is always kept in the front. We keep all display packages of that nature in the front of our section. The rest of the case consists of packages like Plaintiff's Exhibit 155, with a picture of two biscuit in a dish on each side.

There is one instance I can state exactly. There was a lady sent her twelve-year-old boy for a package of Shredded Wheat. He picked out a package of Kellogg's, with the open face. I do not know that he stopped to read it. He took it home. She called me on the 'phone, told me she was sending him back, that he got the wrong package. We changed it for Shredded Wheat.

I think there have been several other instances. A boy in the store has told me that there have been several other times when packages have come back and been changed. I have noticed sometimes that some of the customers will pick up one of the Kellogg's Shredded Wheat and look at it, talk among themselves, and say no, that is not what they want. Then they pick up the regular Shredded Wheat and take it out. We had an instance just two days ago of a woman who bought both packages and said she was going to try them out and see which was the best.

I think that the cellophane opening feature on Plaintiff's Exhibit 153 is the one that would offer the most confusion, because it resembles the regular Shredded Wheat, the genuine Shredded Wheat. I think the picture of two biscuit also has a tendency to confuse to a certain extent, but not so much as the other one.

CROSS-EXAMINATION.

THE WITNESS: There are very few of the Kellogg packages go out. We sell very, very little Kellogg's biscuit in comparison with Shredded Wheat. We have

carried the Kellogg's, I will say, offhand, about six to eight months.

Mr. Wadwitz, of the National Biscuit Company asked me to come down and testify in this case. He said he would reimburse me just for my expenses. We are very friendly.

Of course, there are lots of times, possibly, when merchandise would come back, that I have no knowledge of, because the cashier has instructions that, if anybody brings anything back, no matter what it is, whether it is their fault or the fault of the merchandise, he is to replace it with whatever they want. Those things are not brought to my attention unless there is something radically wrong with it.

I do not think there is anything unfair about the way I have arranged those packages alongside each other. I have no knowledge as to whether people who pick up a package do so because they want that particular package. People who go into a self-service store do pick up one package sometimes, when they really want another one that is right alongside of it, if there is a crowd and they are in a hurry. We have many instances in other merchandise when they do that. Rather than wait for the crowd to get away, they take the first one they can get hold of, to get out.

There are two kinds of substitution: one that might be called fraudulent or deceptive; and the other non-fraudulent or non-deceptive. If a customer asks for one kind of baking powder, and the grocer is out of it, some of the grocers will take a chance on sending her another baking powder. We do not. Absolutely every order we fill down there is filled with what they ask for. If it is part of an order and we do not have the article, we immediately telephone them that we do not have it and ask them if we can send something else. We never substitute on our own hook.

If they said they wanted Niagara Falls Shredded Wheat, and I happened to be out of it then and asked them whether they wanted the Kellogg's and sent it along, I would not regard that as substitution. That would be something that the customers picked out themselves. Such practice in the grocery trade is becoming more and more prevalent. That is, grocers are finding out more and more that there is no use sending a woman something she does not want; because, if they do, she will either send it back or quit trading. There are so many places you can get the stuff you want, there is no necessity for substituting. So, to that extent, I think the practice is becoming less and less prevalent all the time, with the legitimate grocers. There are many who are not legitimate, nowadays. Customers very soon get to discriminate between the legitimate grocers and the illegitimate.

If Shredded Wheat advertising were discontinued, I would not expect that business to go on in its present volume; nor would I expect it with any cereal. Practically any business based on advertising requires constant stimulation by advertising. I would not say that the reason for that is customers tiring of Shredded Wheat and advertising bringing in new customers. Demonstration is, to a certain point, for the purpose of recruiting new customers. Advertising is really intended, primarily, to stimulate customers who are new customers. New customers are coming up all the time, because there is a new generation being born every day. You have to educate them. My father-in-law used to eat Shredded Wheat twice a day. I do not know whether they have to advertise to him to keep him buying it. I do not remember. I have never seen any advertisement of Kellogg's shredded wheat product, to my knowledge.

There is still some of the old fraudulent type of substitution, where one package is made to imitate an-

other package so closely that, when the customer gets the imitation package, she really thinks she is getting the original. In that case, there is an actual deception practiced or intended to be practiced on the customer. When the customer gets this imitation package, she actually thinks she has got the thing she ordered and wanted.

I cannot tell you just exactly how long I have known the Kellogg's shredded wheat product, but it was from the first time it was put out. I would not say it was as long as four or five years ago. When it was first put out, the Kellogg salesman approached me. It was ordered and did not come. We did not put it in for some time after that. This Kellogg product is the only other make of shredded wheat besides the Niagara Falls that I know of. Since I was approached by the Kellogg salesman, I have known of these two brands, the Niagara Falls brand and the Kellogg brand of shredded wheat. The salesman who approached me at that time was one of the regular salesmen in that territory, who handled Kellogg's Corn Flakes and the complete line of Kellogg products. He always calls when anything new comes up. Those salesmen, as far as I know, pretty generally travel the trade in that territory. He calls on all the trade down there.

RE-DIRECT EXAMINATION.

THE WITNESS: It is true that there are various grades or degrees in which packages may be deceptive. I think sometimes the packages are put up in a very similar manner because they are possibly made up with the idea of appealing to the customer's eye, when they know the other package has appealed to their eye, and not as a matter of defrauding the customer. At the same time, I think they do defraud them. Any substitute or imitation, I would think, is a fraud.

RDQ. 96. In what category do you put the Kellogg packages, Plaintiff's Exhibits 153 and 155? Do you think that they are calculated to deceive, or that they are—

A. I would judge that that package there, with the open face was calculated to sell shredded wheat biscuit on the strength of the regular Shredded Wheat advertising.

THE WITNESS: In one of my answers I meant to mention still another product, Muffets. It is a whole wheat biscuit, and I would imagine it is of similar composition to Shredded Wheat. It does not look like Shredded Wheat at all. I never knew of any instances of confusion between that and the Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: I regard Muffets as a wheat product of similar nature to shredded wheat. I do not know whether it is made of wheat that is shredded. It is a similar-tasting product to the others. That is as far as I can tell. I do not know just how they are made. In fact, I would not be able to tell you how Shredded Wheat Biscuits are made.

I do not know that we have any packages intended for fraudulent substitution for some other package; but we have lots of different products, the labels of which are copied very closely from those of other products.

If somebody brought me a product so nearly like Baker's Chocolate that I could make the customer think she had gotten Baker's Chocolate, with the same lettering, I would not handle it, unless it were a superior product. Even then, if it were a product intended to be fraudulently substituted for another product, our store would not handle it. We will not even practice the non-fraudulent or non-deceptive substitutions. We will not even send out a package where the

customer knows the minute she gets it that it is entirely different from that she asked for, without her permission.

We would call her on the 'phone and say that we did not have Baker's Chocolate but we did have somebody else's. If she said all right, then we would send it along. Our store would not carry a fraudulent product. We would not tolerate it for a minute.

When we stack packages of Kellogg's Whole Wheat Biscuit on the cereal counter, we put them alongside the Niagara Falls or original Shredded Wheat. The reason we do that is that both products are very similar. We do the same thing with all our merchandise down there. We put all the corn flakes together, all the wheat flakes together, all the crackers of different kinds; soda crackers in one place, assorted crackers in another. The same way with the soups. All the fish is in one section. We do that to facilitate the customer in picking out merchandise. For that reason, we would put the Kellogg shredded wheat package right alongside the Niagara Falls Shredded Wheat package. We had Muffets right along on the other side, when we carried it.

RE-DIRECT EXAMINATION.

RDQ. 116. Mr. Van Arsdale, you were speaking of the package with the display window in it, Plaintiff's Exhibit 153. I now direct your attention to the package, Plaintiff's Exhibit 161 for identification, and particularly to the legends on the ends of it.

On one end it reads: "Shredded Wheat in its most delicious form;" and, on the other end, it reads: "A shredded wheat product."

Compare that with Plaintiff's Exhibit 153 and tell me whether you think that that package, with the wording I have described, and with the somewhat different picture of the biscuit on the reverse side, is a greater or less confusing package.

A. Well, I think that, if a woman was not absolutely familiar with the other box and going to try shredded wheat, and came in and picked up one of these, she would just as naturally pick up this one as she would pick up the other one.

RE-CROSS-EXAMINATION.

THE WITNESS: I would think it is a universal practice of a manufacturer who has any lawful right to make a product, to try to tell, on the outside of the package, what is on the inside of the package. I do not know of any blind package, in which the customer would have to open the package to see what it actually contains, or I would have to say, "Madam, I do not really know, myself, what is in it. You will have to open the package to see what is in it." I do not think I would handle that kind of package. If the manufacturer for any reason wanted to make a product and he had the right to make it, I would think he would show on the outside of the package what was inside the package when it was opened.

RE-DIRECT EXAMINATION.

THE WITNESS: I would not expect him to show on the outside of the package that it was a product made by somebody else.

ELBERT KIRKLAND:

Deposition taken at San Francisco, California,
February 8, 1933.

DIRECT EXAMINATION.

My residence is 293 Lowell Street, San Francisco, and my business addresses are 1933 Irving Street and 828 Irving Street. The business is a retail grocery. They are cash-and-carry stores, self-

service. I have been in the grocery business about twelve years. The second store was opened about ten months ago, since last April.

I recognize Plaintiff's Exhibit 1, Shredded Wheat. I have been familiar with Shredded Wheat ever since I can remember; as a youngster. I had it in my home before I was in business. I have carried it in my stores. I have conducted a service store.

I know that the expression Shredded Wheat means to the general public just Shredded Wheat. An experience I had at a service store would probably define it a little better. We carried the original Shredded Wheat, or what people would generally say is Shredded Wheat, and we would give them that.

When Kellogg came out with a product similar to Shredded Wheat some few years ago, maybe four years ago, they came into the store and asked me to try it. I did not like it, because it was apparently confusing.

We had a service store. When people would order a product, we would generally send it out as ordered. If we had to answer a lot of questions, it took up time. We were pretty busy and we did not like to do that. We were trying to keep away from duplications.

After considerable persuasion, we took a case of Kellogg's shredded wheat. We had considerable trouble getting rid of it. They would send for Shredded Wheat, and we would get a package of this to try to shove it and get rid of it. They would take it up and say, "What is this?" We would go on to say it was a new product, that they were coming out with this supposed-to-be improvement, as was suggested to us, over the old product of Shredded Wheat. Kellogg's salesman said it was better than Shredded Wheat.

So we carried it until we got rid of it. I do not think I ordered it a second time. I put it in the first time. We had so much trouble getting rid of it, being sent back, we discontinued it, because of the confusion.

They did not seem to know that one as they did the other one. When they asked for Shredded Wheat, that was the one they seemed to want.

In my experience, I have observed some of the advertising done by the Shredded Wheat Company. As to the effect of that advertising on the expression Shredded Wheat, I would answer as to my own mind, more or less. I think the people have been brought up to recognize Shredded Wheat as one Shredded Wheat in the original.

We never had a call for the Kellogg product, even with the amount of business that we did. We generally advertised Shredded Wheat pretty heavy. I do not remember whether, in the last ad I put out, I stated the kind, whether I put Uneeda on there or not.

As a rule, if Shredded Wheat is on sale, they do not say Kellogg's or Uneeda; they ask for Shredded Wheat and go over and pick up Uneeda Shredded Wheat and are perfectly satisfied.

I regard the name Shredded Wheat as a trade name. If anybody speaks of Shredded Wheat, I do not associate it with anything else but Uneeda. I do not believe the customers do, either, from the way they buy. When the purchasing public speak of Shredded Wheat, they think of Uneeda.

CROSS-EXAMINATION.

THE WITNESS: By the word Uneeda they mean the Shredded Wheat made by the National Biscuit Company. By shoving, I mean, when we had the service store, we had two different pieces of goods on the shelf; If you have something that is not moving we call shoving it getting it out of the way, getting it sold and off your shelves. We would send Kellogg's to some customers who were not too far away if it were returned, or who were more or less easy-going, if they did not spec-

ify Uneeda, until we got rid of it. Some of those customers would keep the product. In the main, there was so much trouble, confusion, and complaint that I stopped handling the Kellogg product. I regarded that shoving as being the same as substitution; but it would not be the same as what might be called fraudulent substitution.

I had not given any thought to whether anybody getting the Kellogg's Whole Wheat Biscuit would think they were getting Uneeda Shredded Wheat. What I was interested in was giving them Shredded Wheat if they asked for Shredded Wheat, if they considered that as Shredded Wheat. The two looked the same. Some would try it and some would send it back without even trying it. If it was close to the store, or if the people were more or less easy-going, we would try to get by until we got rid of it, although we do not make a practice of such things.

I did not tell them to try Kellogg's and, if they liked it, to keep it. We expected them to say they wanted the other but they would keep it this time. I do not remember whether, when they called the next time, they would say they wanted the original Shredded Wheat. Some of them did.

I did not think that a business could be built up in Kellogg's shredded wheat on that kind of shoving. I really had not thought of that. It was a matter of my getting out from underneath of goods that were not going over as they should and confusing in two different lines. That was my reason.

By duplication I mean that I do not like to have two brands of the same kind of product made by different manufacturers, any more than I can help. We have corn flakes and post toasties, very similar; yet, they are two that are pretty generally used. We might have three or four brands of canned peaches; but we do not have two dozen kinds.

The kind of brands in which I do not want duplication is those that do not move or are too many of a kind. For instance, we carry S. & W., Del Monte, and Libby's peaches. The only other peaches we will handle will be some gotten in for a special that we get in and out. They do not find shelf room. Those specials we would sell on price inducements, principally.

There was no demand for the Kellogg shredded wheat product in our store, because I did not keep it long enough, and I simply had one case. If we had kept it longer, possibly there would have been a demand for it. With this one case, there was no such demand as to induce me to buy another case of it. It was something that was not moving. I will say that the fact that we could not handle it by shoving or substitution and that there was so much trouble about it that we could not build up any business that way and just did not want to try it any further was principally the reason. I did not like the idea. I thought that one shredded wheat was plenty and let it go at that. I was not the only one in the store. I did not get all the complaints or hear all the calls. I would say that the practice of shoving is distinctly dying out in all legitimate groceries. They cannot get anywhere by shoving it; but they can induce the customer to buy it. I regard inducing a customer to buy it, saying, "Here is a new product with fifteen biscuit to the package. We would like you to try it. We think it is a good product" as perfectly legitimate. There is no substitution or shoving in that. At least, we regard that as shoving, but not as substitution in any way. If a grocer wishes to take that much trouble, I regard that as a perfectly legitimate thing for him to do, if he tells the customer he has a new make of the old product and asks them to try it.

I do not remember how long I have been familiar with Kellogg's shredded wheat product. I would say

maybe four years. If I took on the Kellogg biscuit again in my self-service store, I would put it right alongside the Niagara Falls product. My reason for doing that would be that I regard those two products as being practically the same kind of product, answering the same demand; to give them a chance to choose which of the shredded wheats they wanted.

I would not put the Kellogg Whole Wheat Biscuit down next to the Corn Flakes or anything of that sort. I would put it in the shredded-wheat section of my store. It is fair to say that, for four or five years back, I have known that there were two kinds of wheat biscuit on the market; one made by the Shredded Wheat Company and the other made by the Kellogg Company.

If I were carrying the Kellogg product and a customer were to say to me that he wanted Kellogg's Shredded Wheat, I would send him the Kellogg product.

I came into the case by a gentleman from the National Biscuit Company ringing me up. He asked me if there would be any expense; and I told him I would have to put a man on for half a day; and, as far as the rest of it was concerned, I did not want anything. He said he would reimburse me for the time. I do not know his name. I did know it, but I cannot recall it. It was somebody connected with the National Biscuit Company.

At the present time, I do not handle the Kellogg product; but, if I had a demand, if I found customers repeatedly asking for Kellogg's Shredded Wheat or Kellogg's Whole Wheat Biscuit, then I would stock it up.

RE-DIRECT EXAMINATION.

THE WITNESS: We find considerable demand for Shredded Wheat Biscuit and sell lots of it. It is pretty hard to say exactly how much I sell a month; but I

imagine it is around twenty-five cases. I buy some directly from the National Biscuit Company, and some we do not. If I am putting in a special, I generally get it through Dunne, the salesman, and have him send them out. Sometimes I ring up the Equitable Cash Grocery and get them from them. As a rule, I buy them direct from the National.

RE-CROSS-EXAMINATION.

THE WITNESS: I handle the other Kellogg products, Corn Flakes, and almost the complete line but I do not handle Kellogg's shredded wheat. The Kellogg salesmen call on me right along. They have not solicited me to buy Kellogg's shredded wheat for a long time. There has been a new man, I think, on the territory since I bought; and they have not even suggested it to me. I have not had one ask me to buy it in; maybe, two years. I have not the slightest idea why that is. I had not thought of it at all. In fact, I had not thought anything about it. They have asked me about the other products, Corn Flakes, and so forth. They come in right along; but they do not ask me about Kellogg's Whole Wheat Biscuit. I had not noticed that particularly until you brought it up. I had not paid any attention to their not asking. I do not think I have had a salesman ask me to buy Kellogg's shredded wheat for at least two years, anyway. They have other products. Two weeks ago, one of the salesmen came in, and I bought some Wheat Flakes, a wheat product. I bought that direct.

Possibly the reason for it is that the Kellogg salesman knows pretty well what Kellogg products I carry. I have no doubt that, if I had been carrying Kellogg's shredded wheat right along, when he came to get my order for corn flakes and bran, he would also ask me about that. They do not come particularly to get my order for different products. They generally come in

and introduce a brand, or sampling, something of the kind. They will come out and offer me samples, occasionally, to sample the trade. When my supply of Corn Flakes runs out, I ring up the wholesale grocer. I do not order through the specialty salesman, unless one happens to come by and I would give him an order.

WALTER JOHNSTON COOPER.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: My age is twenty-two. I am not employed at the present time. I have never been employed by the National Biscuit Company or by the Kellogg Company. I am acquainted with Mr. Small, manager of the San Diego branch for the National Biscuit Company. I am familiar with a product known as Shredded Wheat.

I recognize Plaintiff's Exhibit 1 as a package of Shredded Wheat. I have been familiar with Shredded Wheat for about seven years, largely as a consumer. While I was at the University as house manager last year, I had control of all purchasing. We stocked quite a bit of dry cereals. In that capacity as house manager, I purchased Shredded Wheat quite often. When I purchased it, I asked for it as Shredded Wheat. When I did so, I expected to receive the Shredded Wheat package that I see before me, Plaintiff's Exhibit 1. I generally received that package.

I am still a purchaser of Shredded Wheat. I am living with my brother and sister. I do most of the marketing at the store, and we get Shredded Wheat about once or twice a week, or three times in two weeks, perhaps. I usually pick it out. I have been buying it at one of these self-service stores. I find it displayed

there. I pick out packages like Plaintiffs Exhibit 1. I have also ordered or purchased Shredded Wheat at restaurants or cafes, probably about fifteen times.

The general practice in restaurants I am familiar with, of serving Shredded Wheat when ordered, is that they bring you Shredded Wheat in a small package that contains two biscuits, I believe, and serve you in that fashion. They open the box before you, or they put the box in the dish and let you open it. I have had Shredded Wheat like the biscuit in Plaintiff's Exhibit 1 served to me in that way, in individual packages. I never have had it served to me out of the package. I had two occasions when I ordered Shredded Wheat Biscuit and did not receive biscuit like that in Plaintiff's Exhibit 1.

Tuesday afternoon, November 15th, I went in Stout's grocery, located at 2548 University Avenue, in San Diego, and asked for a package of Shredded Wheat. The proprietor of the store gave me a package of Kellogg's Whole Wheat Biscuit. I looked at it and said, "Is this Shredded Wheat?" He tapped the package with his hand and said, "Yes, this is Shredded Wheat." At the same time, he gave me a Kellogg's Wheel of Knowledge, for which I paid him ten cents and left. That is, he charged me ten cents for the package. Plaintiff's Exhibit 171 is the carton. I signed it on that date, in longhand. I see my signature on it and identify it. Plaintiff's Exhibit 172 is the Wheel of Knowledge that accompanied it.

I happen to be a personal friend of Mr. Small. We rent the home we are living in from him. I have played golf with him on several occasions, and I know his son. He asked me if I would help him out one afternoon. He merely wanted to find out some facts in a case where they said there was some substitution going on over Shredded Wheat. He dropped me several blocks from Stout's grocery and asked me to go in and get a pack-

age of Shredded Wheat. I did as he requested and received the information I have testified to.

On the same afternoon, I called at the Plaza Cut Rate Drug and Lunch Stand, Fourth and Broadway, San Diego. On this occasion, I went to the lunch counter and asked for a serving of Shredded Wheat. The boy brought forward a small package of Whole Wheat Biscuit. While he was still down the counter, he opened the biscuit, threw the box away, and brought me the Whole Wheat Biscuit in a dish. I could see him open the box and toss it away.

I asked him for a second helping at the same time. He placed the second in front of me with the box right there. I ate the first one and took the box of the second away. I said, "Is this Shredded Wheat?" He touched the box, and he said, "Yes, this is Kellogg's Shredded Wheat." I made no further comment. Plaintiff's Exhibit 173 is the carton he gave me the second time. I signed that one. I identify it. I cannot say that I was directly acquainted previously with the Kellogg's Whole Wheat Biscuit. I had probably seen it on the shelves and various places in stores; but I had never purchased it.

CROSS-EXAMINATION:

THE WITNESS: If the clerk in the store had handed me a package of Corn Flakes and said "That is Shredded Wheat," I would hardly have believed he was telling the truth. When the clerk in the restaurant said, "This is Kellogg's Shredded Wheat," I knew what he meant as far as he went. I did not take any issue with him, as I would have done if he had told me "This is Kellogg's Corn Flakes." Physically speaking, it was not shredded wheat biscuit that was in those cartons. I believe there is a difference. Your whole wheat biscuit is a smaller biscuit, to begin with, and there is a difference in the taste. I would say that it was a smaller

shredded wheat biscuit and of a different taste from the old Shredded Wheat Biscuit. I recognized the difference in taste and the difference in size right away as soon as it was served to me, being quite well acquainted with Shredded Wheat.

Mr. Small asked me to go to both these places, the grocery store and the restaurant. He asked me, also, to go to one other place, a restaurant. I do not know the name or address, because I went there, asked for Shredded Wheat, and received the National Shredded Wheat. So, out of two restaurants I went to, I received National Shredded Wheat in one and Kellogg Shredded Wheat in the other. In the other restaurant, the boy told me the package was Kellogg's Shredded Wheat.

When I bought the large package of Kellogg's Whole Wheat Biscuit in the grocery store, I did not think, when the man handed me the package, that it was National Shredded Wheat. I knew right away that it was a different package from that which I had been accustomed to. I pointed to the package and said, "Is this Shredded Wheat?" He looked at it and said, "This is shredded wheat," and reached out and touched it with his hand.

The man did not direct my attention to the statement on one end of the package: "Kellogg's Whole Wheat Biscuit are made of delicately flavored whole-wheat shreds. These shredded biscuits are a new convenient size. Two just fit the cereal bowl." My attention was not directed to it in the least. Now that my attention has been directed to it by Mr. Clarke, I have no doubt that the biscuit in there are shredded whole wheat biscuit. I believe they are. I did not take issue with the man when he said it was shredded wheat in the package. I did not try to tell him it was not. I had merely been asked to go and get a statement from him of the bare facts and bring out the information. That

was the only grocery store Mr. Small asked me to go to. He drove out there with me and left me a few blocks from the store. I had never dealt at either of these places before. My usual way of buying shredded wheat is to pick it out in self-service stores. In doing that, I have noticed Kellogg's Whole Wheat Biscuit on display in these self-service stores. It is always arranged in the cereal division of the store. In the store where I happen to purchase our provisions, it is located on one shelf a little bit to the side of the Shredded Wheat, and a shelf or so between with other cereals, Wheatena or Grape-Nuts, or something like that.

When Mr. Small dropped me two or three blocks from the grocery store, he stayed there and waited for me to return. That was the only grocery store he asked me to go to. When I was at the Plaza downtown, they served me in the bowl and threw the box away. I understood the box would be necessary as evidence, so I ate the first helping and had the box of the second placed before me, so I could eat it if I desired to.

I noticed a difference in the taste of the Kellogg biscuit, as compared with the National biscuit. My impression at that time was that the Kellogg biscuit did not seem to be quite as crisp as Shredded Wheat. Whether I had eaten some that was old or had been opened, I do not know; but that was the impression I obtained. I did not notice any difference in color. I noticed a difference in size. I have not eaten it since. It did not appeal to me quite as much as the National Shredded Wheat.

I would not go so far as to say that the difference in taste was sufficiently noticeable that, if I were blindfolded, I could tell whether it was National Biscuit I was eating or the Kellogg biscuit. I do not know. I might be able. On the other hand, I might not, depending upon how much milk and sugar and what-not I had on it, whether it was mixed with fruit or what-not. I

would not go so far as to say that I could tell the difference that way, except that, if I were eating it constantly and then changed to the other, I probably would notice it. I would not know whether it was due to a difference in the food or what. In that sense, I was conscious that there was a difference.

Since this experience, I have not noticed any advertising of either the National shredded wheat or Kellogg's. When I was a buyer for this fraternity house, we ordered through what was known as the Students' Cooperative Purchasing Association, and they sent us as many as we ordered, two dozen, or half a dozen, or a dozen. They were merely stacked on the shelves out in the kitchen. I was always in a position to see what came and what did not. During that time I always received the National Shredded Wheat Biscuit.

It is fair to say that, at least since these experiences of my purchasing in the grocery and the restaurants for Mr. Small, I realize that there are two different biscuits manufactured by two different people. I know that.

RE-DIRECT EXAMINATION.

THE WITNESS: When we had these packages of Shredded Wheat on the shelf in the fraternity house, you served yourself there. It was only eaten for breakfast, and the boys served themselves out in the kitchen. They would go out and take as much as they wanted and break it up or not break it up, and put it in the cereal bowl. They helped themselves from the package.

The Kellogg's Whole Wheat Biscuit I ate in the restaurant did not have any different effect on me from anything else, aside from the fact that I had eaten lunch a while before, and I ate too much of that stuff during the afternoon. The other place I went to I had to eat Shredded Wheat. I was not very hungry.

In the self-service store from which I now purchase, Shredded Wheat is now ten cents. Whole Wheat Biscuit happens to be the same, ten cents. I asked the manager how it was that there was a difference of one cent or two cents, because, in the majority of places I have seen, Kellogg's or the Shredded Wheat made by the National Biscuit Company sells for either eleven or twelve. He said they were both the same price at his store. In other places where I have observed these two packages, they are offered for different prices. Kellogg's is offered for ten cents, every place I have seen it offered. I observed the difference at Canfield's Market, where we do our shopping, known as the Home Food Store. Then, the price I paid over at Stout's Grocery, when I called there, and at the Gem Market, which is cater-cornered across the street from where we do our shopping. I have been in there. Naturally, after doing that for three or four months, you get so you know the prices of about everything you look at in there and where they are located. I have noticed that Kellogg's Whole Wheat Biscuit was always ten cents. Shredded Wheat was the same price in the store where we shop. Other places, there was a cent or two difference.

When the grocer handed me Kellogg's Whole Wheat Biscuit in the package I have identified here and told me it was Shredded Wheat, I did not believe he was telling me the truth.

RE-CROSS-EXAMINATION.

THE WITNESS: I did not believe, I mean, that he was handing me Shredded Wheat made by the National Biscuit Company. I could read on the box that it was Kellogg's Whole Wheat Biscuit. I could see the name, and I was satisfied he was handing me not Shredded Wheat as made by the National Biscuit Company, but

either the same thing made by another company or a suitable substitute for that. That is, in my own mind, I knew that must be the case.

I never tried to get the individual cartons for this fraternity house. I had seen individual cartons in restaurants previous to that time, and I had eaten them previously to that time. The practice in the fraternity house was to open up the large package of the National Shredded Wheat and leave that in the kitchen. The boys just went out and picked the biscuit out themselves. Offhand, I could not say how long it took to consume a box. There were a number of cereals on the shelf, different kinds, and the boys would vary. One day it would be one; another day, it might be another kind. We always had hot cereal of one or two kinds. It would be hard to say. I think we consumed an average of about half a dozen packages a week, pretty close to that, nearly a package a day.

The afternoon I went to the two restaurants I ate some of Kellogg's biscuit at one restaurant and some of the National Biscuit at the other. I did not notice any distress from mixing those two biscuits, except, as I said before, that I had eaten too much of everything.

MRS. DOROTHY McFARLAND.

Deposition taken at Los Angeles, California,
February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife and keep house with my husband. I am not connected with the National Biscuit Company in any way. I know someone connected with the company, the agent at Long Beach, Mr. B. N. Aspergren, who is a personal friend of mine. I am acquainted with a product known as Shredded Wheat.

I recognize Plaintiff's Exhibit 1. I have been familiar with it for ten years, perhaps more, as a purchaser of it. I still purchase it. I usually just buy it in the neighborhood stores; perhaps, at just a little store; sometimes at a self-service store; any of them in the neighborhood. I never have occasion, to my knowledge, to order it by telephone. When I buy it at a service store, I ask for Shredded Wheat, and I expect to get the National Biscuit Company's Shredded Wheat.

In my experience, the expression Shredded Wheat has, I think, denoted to me another product than that in Plaintiff's Exhibit 1. If I understand the question correctly, there are several products similar to Shredded Wheat in the cereal line. They are sometimes called Shredded Wheat.

One experience is the instance at the time I bought this shredded wheat. On November the twenty-first, I bought shredded wheat at Walter's Market, 1050-East Anaheim, Long Beach. I asked for Shredded Wheat, and I got Kellogg's Wheat Biscuit. Plaintiff's Exhibit 174 is the package I got at that time.

I asked the grocer for Shredded Wheat, and he gave me that package. I did not think that was the kind I wanted. It was not the kind I had been buying. I asked him if it was Shredded Wheat; and he insisted it was; that it was the original Shredded Wheat; that the Kelloggs were the first people that made the Shredded Wheat and they made the Shredded Wheat, and that was what it was. So I bought it. The grocer told me that Kellogg's were the first people that made Shredded Wheat, that they made the original Shredded Wheat.

That was about the first time I had paid very much attention to the Kellogg's Whole Wheat package. I would not say that I had not seen it before.

I keep Shredded Wheat in the house. When I serve it to my husband, I usually just toast it and serve it with cream. I do not put the package on the table. I usually toast the biscuit in the oven or warm it up. I take the biscuit out of the package and toast it and serve it on the table in a dish.

CROSS-EXAMINATION.

THE WITNESS: I toast the biscuit because I prefer almost any cereal heated a little bit. I just kind of like it that way. I do not think I knew that the Kellogg's biscuit was double toasted, top and bottom. In the self-service stores, I could not say that I have paid very much attention to Kellogg's Whole Wheat Biscuit on the shelves. It was a Kellogg's package. I thought you meant if I took any particular interest in it. I took enough notice to know that it was there on the shelves.

I believe I have noticed packages having cellophane or transparent windows in them. That was a Kellogg's package, I think. Mr. Aspergren asked me to go to this store at which this purchase was made of the Kellogg biscuit. I had bought things there several times. He asked me to go and buy a package of Shredded Wheat.

When the grocer told me that the Kellogg Company were the makers of the original Shredded Wheat, I told him I did not think that was the kind of Shredded Wheat I had been buying. He insisted that they were the makers of it, that that was the original Shredded Wheat. I was looking for the box with the Niagara Falls on it, which was what I expected to get, Plaintiff's Exhibit 1.

I have always or most of the time associated Niagara Falls with the Shredded Wheat I have been used to buying. I told the grocer that I was looking for the other kind, and he said that was the original

Shredded Wheat. So I said, "All right, I will take it and try it." He said that was the original Shredded Wheat. He did not mention the other kind of Shredded Wheat; but I mentioned it to him. I think this was the only kind he had in the store. I did not see any more on the shelves. I had never bought cereal or anything there before. Mr. Aspergren asked me to go to just this one store only. He did not go with me. I took the package to him afterward. He was out at the Biscuit Company when I took it to him. This is the only experience I have ever had of asking for Shredded Wheat and getting the Kellogg product. I have, however, been buying Shredded Wheat right along for some years. I ate some of the Kellogg's Shredded Wheat. It did not taste like the Niagara Falls Shredded Wheat that I have been used to having. I cannot say that I think it is exactly the same. It is not exactly the same size as the other. The National is the larger biscuit. I think I noticed a difference in taste between them. I have not eaten any of the Kellogg biscuit since that time.

I usually buy at self-service stores. It is either the New Way Market or Ralph's Market, or something like that. I just go in in the usual procedure and get my groceries at the different counters. I usually buy a number of groceries. I just go to the different counters and select them, pick the goods off the shelves into a basket and take it up and have it checked. After the man has checked it, I pay for the contents of the basket. I really serve myself. No clerk waits on me.

I do not know of other kinds of Shredded Wheat besides National and Kellogg's. I did not mean, when I mentioned several different kinds, to refer to Shredded Wheat. I meant different kinds of breakfast food that were rather along that line. I guess I did not make myself very clear. I know only the two kinds of Shredded Wheat, Kellogg's and the National.

MISS ADELE MACDUFFIE.

Deposition taken at Los Angeles, California,
February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have no particular occupation. I am a mother's helper in a home. I live with Mrs. Arthur Lalond, who is not my mother. I help her take care of her family. She has children. I have been with her since March seventeenth, last year. I am not connected in any way with the National Biscuit Company. Mrs. Lalond's brother-in-law, Mr. Malkus, is connected with the National Biscuit Company, I think as a salesman. I would not be sure, because I do not know him personally.

I recognize the package, Plaintiff's Exhibit 1. I have seen those packages before. I have been familiar with that picture about sixteen years. I know what the package contains. I call it Shredded Wheat. I have been familiar with Shredded Wheat for sixteen years or about that time, as a user. I have used it very extensively. I have not had much occasion to buy Shredded Wheat. I come in contact with it at my home and at the residence where I stay. It is served at breakfast. When it is served at home or where I now live, the package is not brought on the table. The biscuit are served by me in dishes. I take it from the package in the pantry and serve it to members of the family, including the children and their parents.

Mr. Malkus asked me to go to some stores and make purchases of Shredded Wheat. I do not remember the exact dates. It was sometime before last Christmas. It is so long ago that I do not recollect if it was in November or not. I went to the Cohen store on San Pedro Street in Los Angeles. I did not know the store. He just drove me there, and I went in.

I said I would like to purchase a package of Shredded Wheat. They brought me Kellogg's. I said, "This is not Shredded Wheat." She said, "Oh, yes, it is." I said, "Is there any difference?" She said, "None, except in price. One is ten and one is twelve. National Biscuit is twelve."

I asked her what the difference in price could be, and she said that they were a large company and they did more advertising and took advantage of the public. I purchased the package. I did not keep it. They took it up to the National Biscuit, and they did not do it the right way. They just took the lids. They had me go back to the store again on a later date, which I do not remember either.

I went back and I went in and asked for Shredded Wheat. She brought Kellogg's. I said, "This is not Shredded Wheat." She said, "Oh, yes, it is." I said, "What is the difference?" She said, "One is ten and one is twelve." She would not say any more. I purchased the package and left the store. I kept that package and put my name and address on it. Plaintiff's Exhibit 175 is the package.

I went to several other stores during my tour of the stores, where I received the National Biscuit Shredded Wheat. I went to the I. M. Silver Store, on San Pedro, also. I went in and asked for a package of Shredded Wheat, and they brought me Kellogg's. I said, "This is not Shredded Wheat." They said, "Yes, it is; see!" He showed me the shredded wheat in the little collophane window, and he showed me the name on the package, and he said, "One is ten and one is twelve." I purchased the package and left the store. Plaintiff's Exhibit 176 is the package I bought there.

In each instance, I paid ten cents for the package. The dealer told me that Shredded Wheat was twelve cents. These were not my first experiences. I had seen Kellogg's Whole Wheat Biscuits previously. We

had some of it in our house. We had purchased it. We had used both shredded wheat biscuit, made by the National Biscuit Company, and Kellogg's Whole Wheat Biscuit. We are familiar with all Kellogg's products, Corn Flakes and all those other products. We carry them in our house, a mixture of products. We have carried and used Kellogg's products almost as much as we have those of the National Biscuit Company.

CROSS-EXAMINATION.

THE WITNESS: I like the Kellogg products. I like the Kellogg Corn Flakes very much. When I first saw the Kellogg biscuit, I noticed, I think, that the Kellogg biscuit is a little smaller, quite a bit smaller than the National. I noticed that right away. When I saw the Kellogg Whole Wheat package, I saw that it was a different package from that of the National Biscuit Company. I liked the Kellogg biscuit, but I preferred the National, as I have used them much longer than I have Kellogg's, because that new package has just come out recently. I have used this other for so long.

When I first tried Kellogg Whole Wheat Biscuit, I did not think it was Corn Flakes or Wheat Flakes, or anything of that sort. I knew it was shredded wheat, all right. When the grocer in the Silver Store said that one of these shredded wheats was ten cents and one was twelve cents, I understood he was referring to the Kellogg Biscuit and the National Biscuit, because he had the Kellogg one on the counter and the other one was up on the shelf. He pointed to it. He said, "This is ten and the other one is twelve." I knew by that that he was referring to shredded wheat made by two different concerns, the Kellogg's and the National Biscuit. I have bought goods from self-service stores, but not in Los Angeles. I do not believe I have bothered with self-service stores in Los

Angeles. I could not say that, either, as to whether there are many of them here. I do not do any shopping, at all.

At the other stores where the grocer referred to the big concern, I understood he was talking about the National Biscuit Company. It was Mrs. Lalond's brother-in-law, Mr. Malkus, who asked me to go to these two stores and make the purchases. He took me in his automobile to several stores down where he sells his products. I think he is a salesman, because he talks about going to those stores. He took me there, and I purchased the package. He took me to several stores, but they handled the National biscuit, and that is what they gave me. He spoke of being acquainted with a few of these grocers, as a salesman. I believe he took me to about five or six stores. I got the Kellogg product at two stores, and the National biscuit at the rest of the stores. I did not know these stores before Mr. Malkus drove me to them. I had never purchased anything at either one of the stores before.

As soon as the clerks at these stores brought out the Kellogg packages, I knew right away it was not the National Biscuit package; and I said right away, "This is not Shredded Wheat." By that I meant that it was not the National Biscuit Company's Shredded Wheat. I did recognize it, however, as Kellogg's Shredded Wheat.

I have never purchased any packages that had the cellophane window in them. We had one package at home that had a cellophane window in it. She went to the grocery store and got the shredded wheat. When we got home, we noticed the cellophane window. She did not want that. I do not recall, but I believe it was Ralph's Grocery Store she went to. We spoke about the cellophane window. I do not remember exactly, but the little boy wanted the window out of it. That is all I remember. He argued about the package.

He wanted the package with the cellophane window in it.

RE-DIRECT EXAMINATION.

THE WITNESS: Mr. Malkus is not related to me in any way. Mrs. Lalond's sister is his wife. I only work for her. That is the way I happen to know Mr. Malkus. He is not related to me in any way.

When I referred to the package with the window as not being what Mrs. Lalond wanted, I meant she had never had it before. When she got it home, she noticed it was not the whole wheat package without the window that she had expected to get. She had gotten a Kellogg package without the window, before that; and, when she noticed the window, she knew it was not what she had been used to having.

MRS. R. E. ANDERSON.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife. I have three children, two, four, and six years of age. I am not related in any way to anyone connected with the National Biscuit Company. My husband is not employed by the National Biscuit Company. I know the matter we are engaged with here is litigation between the Kellogg Company and the National Biscuit Company. I have no bias or prejudice for or against either side of that litigation.

I recognize the package, Plaintiff's Exhibit 1. I call it Shredded Wheat. I am familiar with the contents of the package. I have known Shredded Wheat, as close as I can say, around twenty-five years; a long while. During that period, I would say that the prod-

net contained in Plaintiff's Exhibit 1, which I have known as Shredded Wheat, has been just the same.

Shredded Wheat was served at home, I know, when we were children. We always liked to eat it, because it had the picture of Niagara Falls on it. We thought Niagara Falls was quite the proper place to go on honeymoons and such things. We always had it served in the home. I associated Niagara Falls with Shredded Wheat Biscuit. That has been true since I was a child. The expression Shredded Wheat had a definite meaning to me at that time. It meant the Shredded Wheat Biscuit. It did not mean any other product. Shredded Wheat was simply Shredded Wheat to me. We serve Shredded Wheat in our home at the present time. We purchase it at different stores, mostly the self-service stores. I do my own shopping, go in and help myself. I do not believe I ever have had occasion to order it by telephone.

When I serve it in the home, I do not bring the package on the table. I serve it in the dish. I warm it in the oven and bring it in in the dish. My husband uses it. I usually keep a supply of breakfast foods on hand. I usually try to buy two or three packages at a time, so we will have it on hand.

I have noticed the advertising done by the Shredded Wheat Company. I do not know exactly how long I have been familiar with that, but it has been a long while. I remember Shredded Wheat was advertised in the *Saturday Evening Post* for a long while. That is the only one I have time at present to read. I read practically all the *Saturday Evening Post*. That takes a great deal of time.

Looking at Plaintiff's Exhibit 10, I recognize one of the end panels on which is a picture of a dish with two biscuit in it. I have purchased Shredded Wheat in a carton like that from time to time. I would say I have been familiar with that dish with two biscuit

in it for practically the length of time we have been using it. That picture suggests to me Shredded Wheat and nothing else. If I were to see a package not otherwise identified, having on it a picture of a saucer with two biscuit in it similar to that, it would suggest to me Shredded Wheat.

I have never used Kellogg's Whole Wheat Biscuit. I obtained it in a store on November 14, 1932, at Edward's Grocery, on Glen Oaks Boulevard in Burbank. I went to the store, which is not a self-service store, although, perhaps, it could have been. I was the only one in the store. I went to the counter and asked the man for a loaf of bread, a can of milk, and a package of Shredded Wheat Biscuit. I walked around the store a few moments to see if there was anything else I needed. There was not, so I came back. When I returned to the counter, there was a package of Kellogg's Whole Wheat Biscuit on the counter. I said, "Oh, I want the Shredded Wheat Biscuit, the one that is made in Niagara Falls." He said, "That is just the same, and I am sure you will like it just as well." I said, "I think I prefer the other if you have it." He said, "No, we do not have it in stock." He said it was more profitable to handle, and that there were fifteen biscuits, I believe, in the package. It was just the same as Shredded Wheat. Then he said, "Having a cellophane window, you can see what you are getting."

I finally took the package. Plaintiff's Exhibit 177 is that package. I recognize it by my having put my name and address on it and "Edward's Grocery, Glen Oak Boulevard." The biscuit in the package were visible through the cellophane, and when I saw them through the cellophane window, they suggested to my mind Shredded Wheat. They looked like Shredded Wheat.

I did that at the request of Mr. Harper, one of the salesmen of the National Biscuit Company. He is

an acquaintance of mine. I think I paid fifteen cents for the package. The mark "fifteen cents," in a circle written in pencil near the window on the package was not on there when I got it. I believe Mr. Harper put it on.

I have been paying ten cents for Shredded Wheat. The grocer from whom I bought Plaintiff's Exhibit 177 said he did not have Shredded Wheat. I never paid attention to notice what the price asked at other stores for Kellogg's Whole Wheat Biscuit was. This was my first experience with Kellogg's Whole Wheat Biscuit. I use a lot of other Kellogg products: but this happened to be the first time I had ever purchased Whole Wheat Biscuit. I knew there was such a product. I had seen it on the shelf. I had never purchased it.

CROSS-EXAMINATION.

THE WITNESS: Mr. Harper did not ask me to go in any other stores besides this one store. If I had known the Kellogg shredded wheat was selling for less than fifteen cents at other stores, I would not have said anything to this grocer about his price being out of line. I do not usually do that. I usually pay the price they ask. At the time, I did not know whether fifteen cents was either the right price or out of line at all. I paid it without any question. That was the only store that Mr. Harper asked me to go to and make this purchase. He took me there and waited outside. At that time, there was no one else in the store except me. I could, I rather think, have waited on myself if I had wanted to. They had a counter as you enter. I suppose, if the man was not busy, he would have helped you. Otherwise, it could have been self-service. They were not behind counters. They were easily accessible.

I have known these other Kellogg products for some years, used them, and liked them. I think the company has a very good reputation. It is, also, a wide advertiser.

I gave this package with the cellophane window to Mr. Harper. My children had never seen any of the cellophane windows of the Kellogg's. They are not old enough to have any argument between themselves, as to who would get a package of that sort, if it came into the home. If, as Mr. Clarke says, some other lady testified that her child became much excited and demanded that he have the cellophane package when it was brought into the home, that would be a very good idea. I suppose my little girl might have done that, if she were a little bit older, for her doll house, or something. I did not get one of the Wheel-of-Knowledge Charts like Plaintiff's Exhibit 172, with the package. They did not give me that. I will go back and get it. I do not think my children are old enough to think about the geographical part of it. They would be more interested in just knowing that it goes around.

When I looked through the cellophane window in this package, I saw it was shredded wheat. In other words, I did not think for a minute that it was corn flakes or oatmeal or anything of that sort. I knew that it was the cereal I know as shredded wheat.

I knew before that time that the Kellogg Company was making shredded wheat, as well as the National Biscuit Company. I had known that fact from seeing the Kellogg Company packages on the shelves of self-service stores. When the grocer said to me he had no other shredded wheat in stock except Kellogg's, I understood he did not have any of the National Biscuit Company Shredded Wheat. I do not know of any other concerns making shredded wheat besides the National Biscuit Company and the Kellogg Company. I do, how-

ever, understand that those two concerns are both engaged in the manufacture of shredded wheat.

Looking again at Plaintiff's Exhibit 10, the package with the plate, showing the biscuit in the plate, as distinguished from the picture of Niagara Falls, this one, Plaintiff's Exhibit 1, is uppermost in my mind, because I can remember that Niagara Falls and the picture of the factory. The one with the plate is used a great deal in the advertising. I remember seeing it, of course, on the carton, but this picture on the end of Plaintiff's Exhibit 1 stands out more in my mind than the other. I know they use the other with fruit over the Shredded Wheat Biscuit, in advertising.

I have met Mr. Rodda of the National Biscuit Company. I met him here in this office just recently, sometime in December, in connection with this National Biscuit or Kellogg purchase. I did not take the package out to the plant.

RE-DIRECT EXAMINATION.

RDQ. 109. Mrs. Anderson, I think you said, in response to a question that Mr. Clarke asked you, that you knew that two companies were making shredded wheat. Let me ask you this: If you asked for a package of Shredded Wheat and you received one like the package that you did receive, would you regard that as having filled your order?

A. No; it would not be the Shredded Wheat that I had asked for; but it would be the shape of the Shredded Wheat that I had asked for. It would be the shape of the Shredded Wheat Biscuit, but not exactly like it.

RDQ. 110. When you ask for Shredded Wheat, do you have something definite in mind that you expect to get?

A. Yes.

RDQ. 111. Can you tell us why that is, Mrs. Anderson?

A. Why, Shredded Wheat seems to fill our wants as far as shredded wheat is concerned; and I have never thought of changing. The Kellogg biscuit has more of a toasted look and a coarser grain. The Shredded Wheat biscuit we have been using has a fine grain, and we have never had any complaint to find with it; so I o never thought of changing that product.

RDQ. 112. Has there been any definite association in your mind, during the long period of time you tell us you have known of this product, between the name and the product itself?

A. I have never given it any consideration at all, but always hâve gotten Shredded Wheat and used it. I never thought of anything else, or purchased anything else along that line, except Shredded Wheat. I have always called it Shredded Wheat. That has been true for twenty-five years.

RE-CROSS-EXAMINATION:

THE WITNESS: When I buy Corn Flakes, the food is usually taken off shelves. I usually buy in self-service stores, so I do not have occasion to ask for things by name. In my household, I tend to experiment with new foods or new products or new makes of old products, when they come on the market, if I am not satisfied with what I have been using. If I am satisfied, I do not change, even if some new and different product is advertised. I do not try it. I am not very experimental, because I have the children. If I find anything they like, that agrees with them perfectly, I usually stick to the same product. The children like the National Shredded Wheat. I have only given it to the four- and six-year-old. I try to vary their diet. I usually give Shredded Wheat to them once or twice

a week. They take it and eat it all. I or they have never tried the Kellogg biscuit. I just bought it and gave it to Mr. Harper. No doubt I will try the Kellogg biscuit, after all this, to prove to myself the difference, if any.

Looking at a cellophane package of Kellogg's Whole Wheat Biscuit, the biscuit shown through there does look darker in color than the Shredded Wheat of the National Biscuit Company, also coarser grained than the National Shredded Wheat.

CLARENCE E. LIERLEY.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a window trimmer and card writer. I have no connection with the National Biscuit Company or with the Kellogg Company. I am forty years old.

I recognize Plaintiff's Exhibit 1. It is Shredded Wheat. I am familiar with the appearance of the biscuit in that package. I have been familiar with Shredded Wheat more than twenty-five years, principally as a consumer. I have been a user of Shredded Wheat in my home and elsewhere, during that period. I purchase it occasionally in stores. My wife does almost all the marketing. When I buy it, I ask for Shredded Wheat, and I have something definite in my mind that I expect to receive. I usually go by the carton that they hand me. I look at the carton. I expect to get Shredded Wheat. By that I mean that I expect to get the carton that I am familiar with. Then, if it is in a different carton and I take it home, I expect it to taste like it did before.

When Shredded Wheat is served to me in my home, it is served from a dish. The carton is not brought on the table. I have had occasion to purchase it in restaurants. When I buy it in restaurants, it is served in a dish. I have never had it served to me out of a small carton. I very seldom buy it in restaurants.

I have recently purchased it in a restaurant, when it was served to me out of the carton. That was November 21, 1932, at Byron's Coffee Shop, Long Beach, California. I asked for Shredded Wheat, and the waitress brought the serving in a dish. I noticed the difference in the shape of it. It was not as long as the regular Shredded Wheat. Then, it seemed rounder. I did not say anything about that until I started to eat. I noticed the difference in the taste of it. It did not taste the way I had been accustomed to notice. I asked the waitress: "Is this Shredded Wheat?" She said, "Yes. That was what you asked for, was it not?" I said, "Yes,"—but it did not taste like the Shredded Wheat I was accustomed to eating. Then I asked her if she would mind giving me the carton. So she went and got the carton. As she handed it to me, she said, "This is the Whole Wheat Biscuit." I told her I did not think it was Shredded Wheat. I then asked her if I might have the carton to take home with me. She said, "Sure," so she gave me the carton. Plaintiff's Exhibit 178 is the carton.

There was a menu at that restaurant, one large menu and several small detachable menus attached to the menu. On a menu about three by six inches they had the breakfast foods. It was all attached to this one large menu, and on the bottom, it said, "Shredded Wheat with cream, fifteen cents." It had other cereals listed.

Mr. Aspergren asked me to go to this restaurant. He is an agent of the National Biscuit Company. He went with me, and we had lunch there together. The

biscuit served to me in the dish, except that they were smaller, resembled Shredded Wheat. If I had not been a long-time user of Shredded Wheat, I would have accepted those biscuit as Shredded Wheat.

I have had occasion to notice advertising of the Shredded Wheat Company. I have not noticed any recently; but I remember they used to advertise a dish of Shredded Wheat with strawberries on top, and a picture of a carton with Niagara Falls was the principal thing that stuck out in my mind, that I have always looked for. Niagara Falls was connected with the advertising. I associate Niagara Falls with Shredded Wheat. Ever since I have known it, the Niagara Falls was the part that I remember. When I hear the expression shredded wheat, it has a definite association or meaning for me. It is my favorite breakfast food. It is not the only one I eat; but it is my favorite. The expression brings to my mind the picture of the advertising that I have seen, of the Niagara Falls, and of the Shredded Wheat itself. I recall seeing a picture of a saucer or dish or bowl with two Shredded Wheat Biscuit in it. I can remember seeing that in advertising several years.

If I were to see a picture on a package not otherwise identified, of a saucer containing two Shredded Wheat Biscuit or two biscuit of the type we have been talking about, that would suggest Shredded Wheat to me.

CROSS-EXAMINATION.

THE WITNESS: I would say that corn flakes, oatmeal, and shredded wheat are all different types or kinds of dry cereals. Oatmeal is somewhat of a moist cereal, but corn flakes, wheat flakes, and shredded wheat are different kinds or types of cereal foods. Shredded wheat means to me a certain kind of cereal food. I have not known for more than six months that

the Kellogg Company was making shredded wheat. In fact, I did not know that the National Biscuit Company had any connection with Shredded Wheat until recently. I supposed it was made in Niagara Falls because they had Niagara Falls on it. I do not know whether it is made somewhere else now. I was only interested in it so far as eating is concerned; not in the manufacture. I know now, however, that two different manufacturers are making the cereal which I call shredded wheat. I never had bought any of the Kellogg product before this time I received it. I knew right away that the Kellogg carton was a different carton from the old Shredded Wheat carton. Mr. Aspergren asked me to go to the store. He did not take me to any other store. We went to lunch together. It was not my customary place for lunch. I have eaten there before. Mr. Aspergren seemed acquainted with the place. I judged he had been there before. He did not speak to the waitress. I did not notice whether individual packages of the Kellogg product were in sight. We sat at a table. There was a counter in the restaurant. I did not notice what was on the counter. We did not watch the waitress take the biscuit out of the carton. We were talking and we were away from the counter. When I asked the waitress for the carton, she went right back, got it, and brought it to me. She said she would get it if they had not thrown it out.

I very seldom buy groceries in stores. I have noticed the different kinds of food products, their cartons, in a way. I familiarize myself with anything like that by either the name or something. I have seen many food containers with pictures of plates containing some of the product; plates of spinach, peas, or baked beans. That is a very common practice with food products, showing the product itself in a dish in a satisfying or edible form.

When I speak of recognizing shredded wheat in a plate, I mean that I recognize it is not corn flakes or oatmeal, but that it is the cereal, shredded wheat.

WILLIAM C. RUCH.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have been a merchant all my life. I am now a salesman of Real Silk hosiery. I have been in the clothing business. I have never been connected with the grocery business. I am not connected with the National Biscuit Company in any way. I have owned my own store, at times, a haberdashery in Hollywood. I was eight years in Hollywood and sixteen years in Freeport, Illinois.

I recognize Plaintiff's Exhibit 1. I am familiar with the biscuit contained therein. I have known this item twenty to twenty-five years, as Shredded Wheat. I consume a great deal of Shredded Wheat and have it in my family all the time. I have three boys; five in the family. We almost brought the boys up on Shredded Wheat. All they have for breakfast is Shredded Wheat and eggs, or something like that. The oldest boy is thirty-two, so I practically raised him on it. It is safe to say that I have Shredded Wheat in the house and have had it continuously in my home about thirty years.

The expression Shredded Wheat in my family means a whole lot. During all the time I have been familiar with it, I have had occasion to notice the advertising of the company, and the pictures of the factory. I saw their big, double-page ad not long ago in the *Saturday Evening Post*. I always notice those things. I have noticed a considerable amount of adver-

tising throughout the years by the company. When I see the Shredded Wheat ad, I usually notice the factory, then the package, because that appeals to me. That is what we like. My wife would not buy anything but the large Shredded Wheat. She prefers that. She has tried the smaller one and did not like it. If I were to ask for a package of Shredded Wheat and were given some other package, not like Plaintiff's Exhibit 1, I would not consider I had gotten what I asked for. I would pass it up. I had an experience of that kind, with a fellow named Sam Tucker, in the grocery business.

I asked for a bottle of milk and a package of Shredded Wheat. He brought me the Kellogg package. "No," I told him. "That is not what I want." He put out the Kellogg package and said, "This is much better." I said, "That is not what I want." It was a package like Plaintiff's Exhibit 168, with a window in it. I could see the biscuit on the inside. He said, "This is much better." I took the package because he did not have anything else at the time; but I preferred the other. I took it home and used it.

I made that purchase at the request of Mr. Hornsby, of the National Biscuit Company, who happened to be with me. I gave it to him, and he gave me the shredded wheats, which I took home and used. Plaintiff's Exhibit 179 is the package. The piece of paper with pencil writing is the receipt for the cash paid, written by the groceryman, Sam Tucker. This happened November 22, 1932. I was there after that a couple of times. The second time I received the same. He said, "This is much better." I said, "I hope, the next time I come around, you will have what I want." I have not been there since. I went back the second time because I happened to be down that way. I thought I would pick up another package.

I remember cartons like Plaintiff's Exhibit 10, with a picture of a dish on the end of it very well, because that is the way you usually see them in the advertising in all the leading magazines. My wife prefers that Shredded Wheat, anyway. She will use the other, if she has nothing else; but that is what she prefers. Shredded Wheat means a lot to us.

I have seen Shredded Wheat with dishes in advertising in different magazines, recently. I have seen the dish occasionally on billboards and in the *Saturday Evening Post* and *Good Housekeeping*. I do not remember how long. For some time back, The last I really took particular notice of was a double-page ad. I happened to see that very recently. I would say I have seen the use of this dish with two biscuit in it in advertising in prior years, for a considerable time. That is what draws our attention.

CROSS-EXAMINATION.

THE WITNESS: I do not know any other Kellogg product we have used. My wife usually does the buying. All I remember is just the shredded wheat. She has had Kellogg's when they did not have anything else at the Safeway and other stores. She has bought it before the time I made the purchases for the Shredded Wheat Company. She tried it when it first came out, but she did not like it as well as the real Shredded Wheat. I have used it myself and fixed them with poached eggs. I usually fix my own breakfast, and I like the larger shredded wheat. As soon as I saw Kellogg's, I recognized right away that it was a different size shredded wheat and it was not what I wanted. I went into the kitchen and took the biscuit out of the carton in fixing my breakfast. It is safe to say that my wife always knows what brands of products are coming into the house. My wife would not try

to substitute any different brand without speaking to me. I could tell. Then, she would not buy it. She usually buys a good advertised line.

If my wife had bought the Kellogg's shredded wheat without telling me anything about it and had put some of them into a plate and served me in the dining room, I would have seen right away that I was getting a different shredded wheat than I had had. If I did not like it, I would notice it and speak to her. I do not think any substitution could be practiced on me by my wife with the small shredded wheat in our home. I noticed it was darker in color than the Shredded Wheat. It tasted just a little bit burned to me. It was toasted a little bit more; that is all.

My family is rather particular about Shredded Wheat. That is practically their complete cereal. They use poached eggs and Shredded Wheat. We use very little other cereal; once in a while, oatmeal or something like that. That is usually Quaker.

I have known, from the time it first came to my attention, that there was another concern besides the Niagara Falls concern making shredded wheat. When the grocer handed me the Kellogg package, I knew right away that that was not the Niagara Falls product. Mr. Tucker said it was much better. I told him I did not think so. I said, "Next time I call, I wish you would have what I want," meaning the Niagara Falls Shredded Wheat. He said, I believe, there were fifteen biscuit in the package, a couple more in the package, of Kellogg's. Our family does not, when new food comes on the market, go out and buy it. We will try it out. We are not as prejudiced as not to try it. We tried the Kellogg product, because that was all they had in the Safeway Store that happened to be near us at the time. If we had happened to like it better with the dark toasting, we would have stuck to it.

If a new product from a responsible concern was left at our house, we would try it. If the Kellogg Company left a sample at our house of a new product, we would try that. I believe I would, because we have lots of different things of Kellogg's. We have used other products of the Kellogg Company. I regard the Kellogg Company as a responsible concern with a good reputation, a long time in the food business. I have known the Kellogg Company just about the same length of time as I have known the National Biscuit Company. I know them as large advertisers of their food products. I have seen their advertisements.

SIDNEY W. RODDA.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am district sales manager of the National Biscuit Company in Southern California and Arizona, with headquarters in Los Angeles. I have jurisdiction over the branches in southern California and in Arizona; the Central Los Angeles agency, the Pacific Los Angeles agency, the Long Beach agency, the Riverside agency, the San Diego agency and the Phoenix, Arizona, agency. My duties are of a general supervisory nature over all those agencies. As district sales manager, my immediate superior is Mr. Warner, in San Francisco, who is the regional sales manager.

In connection with my duties, I have occasion to visit the trade very often. Usually, when I visit one of the branches, we clean up the few necessary details and immediately go out to call on the trade. I accompany the manager or special salesmen, usually. The agencies over which I have jurisdiction handle

Shredded Wheat along with other products manufactured by the National Biscuit Company.

We have had very close to a 100 per cent. distribution of Shredded Wheat in our territory. By that I mean that the product is found in all or nearly all the retail stores I visit in this territory. The sales of Shredded Wheat have diminished in this territory in the last three or four years. One good reason I assign for that is Kellogg's Whole Wheat Biscuit, which sells in competition with Shredded Wheat.

I have known Shredded Wheat for many years, particularly since 1922 or 1923. We had Shredded Wheat at that time in my home, before we had anything to do with Shredded Wheat, before the National Biscuit Company acquired it. Shredded Wheat is considered a household word. Shredded Wheat means the original Shredded Wheat Biscuit that is now made by the National Biscuit Company. The name Shredded Wheat means Shredded Wheat. It means the Shredded Wheat Biscuit that we have always known as Shredded Wheat Biscuit. It is known as such in the household and in the home. I have asked the questions of my wife. She says that it is known as the Shredded Wheat, that Shredded Wheat is a household name. She knows Shredded Wheat in the home as Shredded Wheat. When she thinks of Shredded Wheat, she thinks of the original Shredded Wheat. That is her statement to me in our discussions. I do not believe that is peculiar to her, because she is not particularly inclined to shop around. She usually shops at certain stores. She knows what she wants, and she buys what she wants.

As I have circulated among the trade, I have noticed the presence of the Kellogg Whole Wheat Biscuit in the stores, and I have had occasion to notice the prices of Kellogg's Whole Wheat Biscuit and

Shredded Wheat in the retail stores. To a considerable extent, there is a difference in the retail prices in the stores. Shredded Wheat is the higher. I have observed in many stores that there is a difference in price, in many instances, of one cent a package. In a good many instances I have observed, Kellogg's Whole Wheat Biscuit is ten cents and Shredded Wheat is eleven cents. In some instances, Whole Wheat Biscuit is ten and some Shredded Wheat twelve. My general impression is that the differential in price in the stores is the rule, not the exception.

In connection with my duties, I make it my business to know what the two products are sold for by jobbers to retailers. I have information as to the relative prices at which the retailer can obtain Shredded Wheat and Kellogg's Whole Wheat Biscuit. I know of one particular instance where I saw a cost book, which indicated that this dealer was buying Kellogg's Whole Wheat for \$1.89 per case of twenty-four, which would be on a basis of \$2.83½ for thirty-six, as compared with the price this man was paying for Shredded Wheat, \$3.34 per case of thirty-six. That is what I have generally observed. There is a difference in the price from jobber to retailer.

We have also requested information as to the prices from manufacturer to jobber and find there is a differential there. In one instance, we found that Kellogg's Whole Wheat Biscuit was \$1.80 for a case of twenty-four. We received that quotation from the jobber. That would be equivalent to a price of \$2.70 per case of thirty-six. His net price on National Biscuit Company Shredded Wheat is \$3.30 for a case of thirty-six. I would say that this differential has a great effect on the distribution of Shredded Wheat.

In the self-service stores, Shredded Wheat is stacked on what they call island displays in the center of the store, and Kellogg's Whole Wheat Biscuit

nearby, with the prices on the stacks, indicating to the consumer what the retail price is. In others, Shredded Wheat is on the shelves and Kellogg's Whole Wheat Biscuit is on shelves, with their prices.

From the standpoit of profit and from evidence we have heard, the retailer pushes one in preference to the other. The fact is that the dealer does make more profit on the Kellogg package, in those cases I have investigated.

CROSS-EXAMINATION.

THE WITNESS: The National Biscuit Company has not put on special sales to the trade recently, on Shredded Wheat, not since last May. As far as I know, the National Biscuit Company has permanently abandoned the policy of giving special sales and special prices to the trade. There is no indication that it is going to happen. We have a regular list price, and then we have a scale of discounts, which extends from ten per cent. direct to an individual, all the way up to seventeen and a half per cent., which is the maximum discount to a retailer, based on quantity.

The National Biscuit Company never makes any allowance from those prices for advertising done by the retailer on Shredded Wheat. We never give the retailers any special prices to cover advertising done by the retailer, never give them checks, or never make them any allowances, directly or indirectly. My duties as district sales manager give me access to the cost sheets of my branches, which are consolidated here. We know exactly what is issued, so far as this group is concerned.

The dealers do advertise National Shredded Wheat. Very often, they do it themselves, without any solicitation. Very often we suggest that they advertise Shredded Wheat as a leader. They do it simply

on our suggestion. There is no other inducement. There is no other service we give them in connection with their advertising sales, unless we have a salesman go in on a Saturday for a sales promotion and conduct a sales promotion. In that event, all he does is sample to the consumer. I do not know of any instance where Shredded Wheat was sampled. It is just crackers I am speaking of. Insofar as their advertising is concerned, all we do to induce the retail grocers to advertise our National Shredded Wheat is just to suggest they put on a sale. Many times, however, our salesman will be present in the store on a Saturday and sell Shredded Wheat, together with other products. I do not regard this as an inducement to the grocer to advertise for us. I would regard it as co-operation on developing sales on our line; because there is more involved than Shredded Wheat right there. That costs us something, but we usually make money on it, because we make greater sales. We absolutely do not give a better discount when those sales are on than we do ordinarily. The only advantage to the retailer when we put the salesmen into the store is that he gets the volume discount in the larger range. They usually earn the discount in the respective classes of discount. In most cases where our salesmen go, they go where there is volume. Usually they earn the discount, anyway. All our discounts are based on quantity purchases, on volume.

The presence of our salesman in the store helps the retailer increase volume so that he gets into a larger discount range; but, in the situation that exists today in this field, most of the stores in which we demonstrate are the stores where there is the larger volume. Usually they earn the discount, whether the salesman is in there or not. In other words, the presence of the salesman does not help the grocer from one class of discount into another class of discount, to my knowledge,

because, in most instances where the salesmen go in, the salesman is interested in increasing sales. He is interested in that, because it increases his commissions. So he will naturally pick out the volume store in order to hold a sale. He increases the volume of that store over what it was if he did not go in there. In most instances, that does not make any difference in the discount to those particular stores. He cannot earn any commissions without also increasing the profits of the retailer correspondingly. I do not say that none of that is sufficient to put the retailer from one range of discounts into a higher range. In most instances, however, our salesmen select the volume stores, which usually earn the maximum discount without that help.

We give no inducement to the retailer, whatever, to do any advertising at the dealer's expense. Wholly aside from whether that is true from Mr. Clarke's view or from the standpoint of bookkeeping or figures, my opinion, as I read the figures, is that the National Biscuit Company does not give and does not intend to give any inducement, whatever, to carry an advertisement of Shredded Wheat at the retailer's expense. Usually a reduced retail price at a sale is not suggested by us. We more often suggest that they advertise certain varieties. We do not say particularly Shredded Wheat. In most instances the advertising on the part of Shredded Wheat has been done voluntarily.

When we suggest that he advertise, that means usually that he advertises at a lower price. No one puts an advertisement in the paper to say that he is selling Shredded Wheat the regular price, usually. That suggested advertising price is not made by us. It usually depends upon the competitive condition that exists in that territory. Usually, there is a price on the merchandise that is advertised, just like everything else. They do not usually advertise the merchandise at the high price. Although I have known of par-

ticular instances where they have advertised Shredded Wheat at the regular retail sale price that it was selling in their store. They did that to increase their volume. This particular sale price I have reference to was advertising Shredded Wheat at ten cents a package. The net to that particular dealer is \$3.30 a case of thirty-six. It is an unusual case; but he has done that before. His competitors in that neighborhood have advertised that they sold the regular National Shredded Wheat for less than ten cents; yet, he has maintained that price. I do not recall that those advertisements appeared at the same time.

I do not think he would be apt to do it if he knew it. Usually, they do not know what the other fellow is going to advertise, and we do not make it a practice to go from one to the other, indicating what one dealer is going to advertise it for over the other. In other words, my point is that we do not make it a practice to go from one dealer to another and indicate what the resale price is going to be or just what an advertised price is going to be. There have been advertised sales where the price has been lower than ten cents. I mean to say that price competition exists and has affected our sales.

I have been with the National Biscuit Company twenty-four years. I would not say that the National Biscuit Company have been one of the leaders in having their goods advertised at special low prices. I would say that the retailers have advertised National Biscuit Company's products extensively, but there are other brands that they have advertised at lower prices. Retailers have done some cutting of National Biscuit Company brands as price leaders or bait lures, or whatever you want to call them, trying to get people into their stores to buy the National line; but, when they do that, we rather encourage them not to cut under cost. We have not, however, tried to dis-

courage them from using it as a leader. We encourage them to feature National Biscuit Company's crackers, but not at a loss, not as loss leaders; but as attractive price leaders. I do not know that that has been the general policy of the National Biscuit Company since I have been with it; but, as field men, we encourage the featuring of National Biscuit Company's brands at a fair price. We do not encourage going down to cost; we rather discourage that. That is the only point at which the discouragement of the National Biscuit Company is applied to price cutting on its products, so far as we are concerned here. The only discouragement that we put on price-cutting on Niagara Falls Shredded Wheat is that they do not sell at a loss. We encourage that they do not sell at a loss. By that I mean that they should not sell for less than they pay for the product. We still encourage them to sell at a little more than cost. I would not say definitely what that figure should be, because individual cases are different. I do not mean to say that they should not sell at a loss, so far as donating their services and time and money that may be invested in the product is concerned. In suggestions that are made by dealers to our salesmen, in discussing possible sales or prospective sales, I believe it does not get to the point of just saying "Do not sell for a loss," or anything like that. I mean that, in many instances, the dealer discusses with our salesman and asks him, "What will we advertise?" Usually there is a discussion and the profit is figured, insofar as their resale price is concerned, when compared to their cost price. If a retailer were to say, "Suppose I advertise Shredded Wheat for less than it cost me," I do not know what our man would say. I would say that our salesman would rather discourage that practice.

I was with the National Biscuit Company when the Shredded Wheat Company was taken over by them.

The sales of the National Shredded Wheat were not taken over by the sales force of the National Biscuit Company right away. As soon as it could be done; some time after the amalgamation, it was taken over by the regular sales force of the National Biscuit Company. Those were men who, before that time, had been engaged in the sale of National Biscuit Company products, principally the cracker line. With those men, they had this added product, the Shredded Wheat, as an addition to the cracker line, to be sold by them. We distributed Shredded Wheat on a similar basis to the Shredded Wheat Company, the first year. Then it was turned over to our salesmen. We began to distribute Shredded Wheat in the same way that we distributed the rest of the National Biscuit Company's cracker line, with our products. That involved our distributing it predominantly through our own force, direct to the retailer, rather than predominantly through wholesalers; but we maintained sales through wholesalers and do today. Wholesalers carry it today. When the Shredded Wheat Company was in charge of the business, however, the sales of Shredded Wheat were made through wholesalers practically exclusively.

Since the National Biscuit Company got its system into operation, orders are taken by our salesmen, and we deliver the merchandise to the retailer. The wholesalers naturally only get such orders for Shredded Wheat as are not supplied in the regular way direct by the National Biscuit Company. The volume of Shredded Wheat distributed through wholesalers has been diminished at least by the amount which is now distributed direct by the National Biscuit Company.

We do not expect the same sales co-operation from the salesmen of wholesale houses now, as the Shredded Wheat Company had when all its product was distributed through wholesalers; except that many of the wholesalers are so tied up right now with voluntary

chains that considerable of the merchandise is billed direct through those voluntary chains in this territory. That has had a big effect on the jobber. We call and give the direct service to the retailer and bill through organization headquarters. They do not need to move it. In those instances, I would say that it would not make any particular difference.

However, as to the wholesalers whose business is sharply cut down in National Shredded Wheat by the fact that the National Biscuit Company has taken over the distribution, I would not, it is true, expect the same sales efforts from those wholesalers that they used to give to Shredded Wheat through their salesmen when the exclusive distribution was through wholesalers; except that, in recent years, there has been quite a change in the distribution of food products in this territory; and practically all those old-line jobbers are now accepting a billing of the manufacturer through their headquarters, where the delivery and contact is direct with the retailer, who is a member of the organization that is sponsored by the jobber.

It is difficult to say how many individual products there are in the National Biscuit cracker line. We class them as sponge goods and sweet goods. There are many different items of sponge goods, of sweet goods, and of cracker goods.

We have a regular sales force solely for contacting retail trade. When the National Biscuit salesman calls on the retailer, he will go from store to store, where the buying is done by independents, and he will take orders in that store for everything we have in the National line, through sponge goods, sweet goods, cracker goods and the cereal.

Where a particular store carries the general line of National goods, including not only Shredded Wheat, but the crackers, sweet goods, sponge goods, and so forth, the salesman gets quite a substantial order. If

he went to a store across the street which handled only Shredded Wheat, I do not know whether he would simply get a Shredded Wheat order. We endeavor to sell them all. I was quite astonished to find one store that did not handle any National line except Shredded Wheat, here, yesterday. I do not mean to try to create the impression that they all carry the whole National line, but I was quite astonished. What I mean to say is that they did not have the National cracker line in what, apparently, was a representative store. In that store, our salesman, if he spent any time there, would not have an order for anything except, perhaps, National Shredded Wheat, unless he succeeded in selling them the rest of the line. That would be equally true of all stores which handle nothing of the National line except Shredded Wheat. Usually, when a new product is introduced, it is sold to the headquarters of the chain or the independent, and displays are usually arranged for; attractive displays are made. We, and I know practically all manufacturers would encourage the trade to feature an absolutely new variety, a new product. Kellogg's shredded wheat, to my knowledge, has been, I would say, featured and brought to the attention of the consuming public in the various ways mentioned. It has been advertised to the public by the dealers, also by the manufacturer; and the manufacturer has supplied selling helps to the trade, wherever they could get them to put in cards referring to whole wheat. In other words, I believe the Kellogg Company has used all the ordinary and best known, most effective methods of introducing a new product to the consuming public through the retail trade, referring to Kellogg's Whole Wheat Biscuit. There is no indication in the stores that the Kellogg Company was trying to conceal the fact that it was in the market with a whole wheat biscuit.

I would not say that the self-service type of store is on the decline; it is rather on the increase.

I am familiar with the Kellogg biscuit. It is a shredded biscuit, a shredded whole wheat biscuit. I would not attempt to say that it is just as much of a whole wheat biscuit as the product of the National Biscuit Company; but it is a shredded whole wheat biscuit, as far as I can see. It is so advertised and stated on the cartons. I have no idea whether our gross price to the Safeway headquarters is different from Kellogg's. I know our price to them is the same as to other large accounts. There is no special price. The net price to Safeway outlets, with all discounts off, on Shredded Wheat, is \$3.30 net; which is \$4.05, less seventeen and a half and one; seventeen and a half being trade discount and one being cash discount. That price is public and known to the trade and everybody, as far as I know.

Assuming that the sale of Wheatus in this market in 1932 was 150,000 cases, with the tremendous number of cereals in the stores, I do not know it would affect Shredded Wheat a great deal. I do recognize that other wheat cereals would come in competition with Shredded Wheat or Whole Wheat Biscuit; but, in my opinion, with the tremendous line of cereals in the grocery stores, the effect on any one particular variety would be small, compared to the total. All cereals are competitive.

I would not concede, however, that, if a wheat user who had formerly used Shredded Wheat were to find wheat in a more attractive form to him, he would stop using Shredded Wheat. I believe that all cereals are competitive to a certain extent; but I believe that Shredded Wheat would be a lesser competitive item than corn flakes or All-Bran, or something like that. I do not know about the Kellogg product, but I know there are many who have been users of ours for many

years. Undoubtedly people shift around some. There are several cereals on the shelf in our home; but we constantly have Shredded Wheat. I think that is true of every home that uses cereals. It is my opinion that that pretty much exists. I do not mean every home has Shredded Wheat; but I mean, from evidence I have heard and discussions I have had, it seems to me that anyone who used Shredded Wheat regularly would have it in the home all the time, even though other cereals came in. I took home some last night. I saw some cereals on display; and I was particularly interested in knowing what that cereal was, but that did not replace Shredded Wheat on our shelves.

In this territory, we have an excellent distribution of Shredded Wheat. I do not know anything about the territory back East. I do not know anything about Shredded Wheat outside of this territory, because I have been in this territory entirely since we have had Shredded Wheat. Our advertising, our sampling, and our demonstration certainly reached people who were not already customers of our company. We do not regard all the sales work as done merely to hold in line the army of National Shredded Wheat users we already have. We are constantly featuring Shredded Wheat, in order to increase our volume. When I say *distribution*, I mean distribution to the retail stores, not to the consumer. I do not think that our Shredded Wheat makes our customers immortal in any way. We lose some of our customers by death. As one user goes out, we do hope that more will come in.

My statement was with regard to the distribution to the retailer. There is a field, we believe, among the customers, for increasing sales, surely. We hope to increase the number of consumer customers faster than we lose them by death or by change of appetite or by their getting tired of Shredded Wheat. If we did not

hope, by all our new sales efforts, to always recruit more public customers than we are losing, I do not believe we would advance the sales efforts. Those sales efforts are obviously directed to the end of increasing consumption and getting new people.

If we did not expect to increase our sales, we certainly would not continue it, or to maintain our present volume. There is a constant effort on our part, right now, to maintain our present volume. That is our battle right now. I would not say that a consumer eats Shredded Wheat three hundred and sixty-five days in the year, if that is what you want me to say. We have found, however, consumers who have not only made the statement that they did that, but that they conveyed that to their family.

When the National Biscuit Company took over Shredded Wheat, I am not familiar with any guarantee against price decline or guarantee of sales. When we changed from distributing through the jobber to direct by us through our selling force, the list price, I believe, was set at a figure that was practically the same as the net price to the jobber before the National Biscuit Company started to distribute Shredded Wheat direct.

The procedure is a little hazy in my mind, as to whether jobbers were notified beforehand that the change was about to be made; but I believe we gave them sufficient time, to let them cut down on their orders of National Shredded Wheat, so they would not be loaded up with a lot of it when we took over the direct distribution. I believe that was done. I am a little hazy on that. I do not remember any difficulties in this territory with wholesalers about stocks. My territory includes southern California, but not San Francisco.

I have tasted Kellogg's shredded wheat. I notice a difference in taste; and I have noticed the difference

in size and in the packages. I have noticed some difference in the toasting. I do not know whether it is more toasted than Shredded Wheat, but I know it has a darker color. I could not say whether there is any difference in the shreds. There is a difference in the size of the biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: Without giving figures, just estimating, my impression is that about 45 per cent. of the jobbers in my territory are affiliated, in one way or another, with retail outlets, such as voluntary chains. Practically all the large jobbers in this territory are either sponsoring voluntary chains or are sponsoring some sort of organization whereby they accept drop shipments of our line through the retailers. That is generally true in southern California. In other words, although the method of distribution of Shredded Wheat has changed from the jobber directly to the retailer, the jobber is still participating in that business, as a sort of purchasing agent for those voluntary chains. He gets some part of the purchase price. He figures on retaining a profit.

I noticed, in some newspaper advertising that has the co-operation of the newspaper with the manufacturer, they were advertising Kellogg's as the new shredded biscuit. It looked like Kellogg-sponsored advertising in the papers. I would not say that I recall having seen a display of Kellogg's Whole Wheat Biscuit marked Shredded Wheat, on cards, or anything of that sort.

I know that this Shredded Wheat Biscuit that is now put out by our company, from my own observation, when it was introduced was a new form of food product, away back in the beginning. My opinion is that, when it was started, it was something entirely

new to the public. I do not remember that, because it was quite some time back; but I do know that the Shredded Wheat Company, throughout a long period of years, use a great many methods to introduction, to teach the public to use this cereal. That has gone on to such an extent that Shredded Wheat has become a household word.

RDQ. 269. Let me ask you this: Do you think that it is as difficult a problem for the Kellogg Company to introduced their Whole Wheat Biscuit as a new product, as it would be if the Shredded Wheat Company had not done all this prior work?

A. Why, there is no question in my mind but what they are cashing in on that prior work done by the National Biscuit Company or by the Shredded Wheat Company.

THE WITNESS: By that I mean that, a Shredded Wheat Biscuit being a well-known product, it is less difficult to introduce something that is like it.

Shredded Wheat is not used generally as a loss leader, by retailers. We do not encourage that.

RE-CROSS-EXAMINATION,

THE WITNESS: I could not determine what volume of grocery business the voluntary chains do in my district. I can only estimate from my own knowledge of the cracker business. I would have no way of determining the total volume of grocery business. I believe I said that was from around 30 to 40 per cent. That is an estimate, without referring to my records or figures.

I have no idea what per cent. of the business the super-markets do, but a lot of them buy through voluntary chains. Therefore in my estimate, the voluntary chain figures would include those super-markets that are billed through voluntary chains.

HENRY BEEMAN RICKARD.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer. I own the real estate and operate the grocery department of the La Manda Park Public Market, at 2526 East Colorado Street, Pasadena. I also lease concessions for the other branches of the market to others. I have been connected with the grocery business close to twenty years, working at it for five and in business for myself fifteen years, always in southern California.

I am familiar with Plaintiff's Exhibit 1. I call it Shredded Wheat Biscuit. I am familiar with the product itself, as found in that package. I have been familiar with Shredded Wheat ever since I have been connected with the grocery business. I have always carried it in stock. During my familiarity with it, the biscuit has always been of the same general shape and appearance. I do not believe there has been any change in it, that I know of.

I know what Shredded Wheat is. I have tried it, but I do not eat it. I do not care for it. Our store is a self-service store and we deliver orders, also. We receive orders over the telephone. We carry Shredded Wheat in the store now and find that it sells readily. It is a good seller, one of the best sellers, I believe, of the breakfast foods.

I have noticed, in my experience that the Shredded Wheat Company has extensively advertised its products. I have noticed their advertisements quite a bit. When our customers ask for Shredded Wheat, we always give them the Shredded Wheat Biscuit, that package, Plaintiff's Exhibit 1.

I think the expression Shredded Wheat has a definite meaning to the general buying public. It has been

on the market so long that it should have. I know it has to me, and I judge that the average person has the same mind. When a person thinks or speaks of Shredded Wheat, to his mind is meant, naturally, the Shredded Wheat that has been on the market all these years.

We receive occasional telephone orders for Shredded Wheat, and we supply Shredded Wheat. I know the Kellogg's Whole Wheat Biscuit. We carry that. When a customer asks for Shredded Wheat Biscuit, I have never supplied the Kellogg's biscuit, unless they specially ask for Kellogg's. We always send them Shredded Wheat.

Q. 33. Have you ever observed customers in your store pick up either Kellogg's or the Shredded Wheat?

A. We have, more lately since the Kellogg puts a window in there. We have had them ask, "Well, are the Shredded Wheat people putting out a new biscuit?" And we told them, "No; that is put out by Kellogg's; they are putting out one that is similar."

Q. 34. Do you mean that they ask that question with reference to the Kellogg package?

A. Yes.

THE WITNESS: I have reference to Plaintiff's Exhibit 168. We have had them for the past two months with the window in. We have not always had them so. I would say that the presence of the window shows that it is a shredded wheat biscuit. It is very similar to the other. I think Kellogg's Whole Wheat Biscuit could be sold as Shredded Wheat biscuit. I have noticed our customers pick up the Kellogg package and then "I do not believe this is what I want," and they will go back and change it, or vice-versa.

I have had some experience in observing the introduction of new products, by advertising and by sampling. The way they introduced Kellogg's Whole

Wheat Biscuit to us was by price. If I remember right, the reason we put it in there was on a price concession. I think it was a little cheaper than Shredded Wheat; and we put it in for that reason, because everything Kellogg has is a good seller, and we naturally figured the whole wheat biscuit would sell along with the others. I think the Kellogg's Whole Wheat biscuit would be introduced more easily because it is like a well-known product. It is shredded wheat. In other words, it could be sold, because it is a form of shredded wheat.

Our retail price on both Shredded Wheat and Kellogg's Whole Wheat Biscuit is ten cents. We get the Kellogg's biscuit a little bit cheaper than the Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: I appeared here today to testify at the invitation of the National Biscuit Company. They said they would look after my expenses and time for me. My store is one of the regular self-service stores in which the customer waits on himself. Our store is arranged that way inside. We have our delivery and telephone service in the back; but our store proper is where people wait on themselves. In the store I think we give better display to the National Shredded Wheat than to the Kellogg Whole Wheat Biscuit; but we give a good display to the Kellogg shredded wheat, because we have quite a sale for all the line, and we give it a good display. I recognize that both those products are shredded whole wheat biscuit. You would call the Kellogg's that, because it is similar to the other; and, to me, it would be a whole wheat biscuit, looking at it, yes. If they advertise it as a whole wheat biscuit, I think it would have to be whole wheat. It is just as much of a shredded biscuit as the National Biscuit product is. It has been three or four years since we

have stocked Kellogg's; but I believe it was out sometime before we stocked it. I do not know.

I should think it should be pretty common and general knowledge in the trade by now that the Kellogg Company has put out a shredded whole wheat biscuit, because they are very active about introducing all their lines. Their shredded whole wheat biscuit has been introduced in the regular ways a new product is introduced, by sampling it, inducing some of the dealers to advertise; and they have had displays in the stores.

I do not believe the Kellogg biscuit is the same size as the National biscuit. I believe it is a smaller biscuit, as you can see it there in the cellophane window in the Kellogg package. I do not know whether it is as long a biscuit. I do not use it. I have not opened up the packages. I have seen it opened, but I do not know.

Putting one of the Kellogg packages end-ways on top of the National package, I should judge from that that the Shredded Wheat was a substantially longer biscuit than the Kellogg's. Corn flakes, oatmeal, and shredded wheat, I would say, are three different kinds of cereals.

XQ. 69. By the name Shredded Whole Wheat Biscuit, do you mean a dry cereal, made of shredded wheat?

A. It would naturally, to my mind, be the old Shredded Wheat; but I realize that the other is a shredded wheat, too; but it would naturally bring to my mind the old Shredded Wheat. For instance, if a lady came in and asked for a package of Shredded Wheat, I should hand her the package of old Shredded Wheat.

THE WITNESS: If the lady asked for Kellogg's Shredded Wheat, I would give her Kellogg's; and, in that case, I would regard her as getting shredded wheat made by the Kellogg Company. If she asked for

Shredded Wheat and I gave her the Kellogg product, she would be getting shredded wheat made by the Kellogg Company.

I would say that the Kellogg's Whole Wheat package was a familiar Kellogg package, as to the color and the color of the lettering. I would recognize that as one of the family of packages of the Kellogg Company, their familiar red, green, and white color scheme.

As I said, since the cellophane window packages came in, a lady had said the Shredded Wheat people were putting up a better, a different shredded wheat, a smaller shredded wheat. I said, "Well, that is put out by Kellogg's." One lady said that to me.

Until the cellophane window was put in the Kellogg package, the grocer would have no doubt as to just what was meant by a whole wheat biscuit, because it had been shown to him. I suppose you could have seven or eight or ten kinds of whole wheat biscuit. If this window were not put in there, anybody who had not already seen one of the packages would not know just what was in Kellogg's Whole Wheat, if they just called it Whole Wheat Biscuit. The grocer would know, naturally. After the cellophane window was put in, the people would see what kind of whole wheat biscuit it was that the Kellogg people were marketing. I would not say that this looks like a much darker biscuit than the National product. It looks to me just like it, very similar. Not having seen either one of them opened in recent years, I would not say without seeing them together. I would not express an opinion.

If I were told that Mr. Rodda, the representative of the National Biscuit Company, stated that, to him, these biscuit looked darker than the National biscuit, that would not surprise me, because he probably knows a lot more about it than I do. To me, that would look just like a Shredded Wheat Biscuit, figuring that the other shredded wheat could be browner than theirs.

I do not know that they always get them just the same bake. From my observation as a grocer, I would say that the Kellogg Company is trying all the well-known ways of introducing its shredded wheat biscuit to the attention of the public. They are advertising it and merchandising it, and such as that. Those methods Mr. Clarke mentioned: manufacturer's, advertising, dealer advertising, sampling, demonstrating, store displays, are the generally practiced and best-known methods of introducing a new product to the attention of the consumer. The cellophane window would also tend to attract attention to the Kellogg package. It is rather a novel form of cereal display, not adopted by very many of them. I have never seen a window like that in any of the National Biscuit Shredded Wheat packages. It is possible that it would also appeal to children, that they would like to get hold of empty packages with the window, for playhouses and things of that sort. In my store, premiums like the Wheel of Knowledge have been distributed with the Kellogg's product. The distribution of a novelty of that sort would tend to attract attention to that package, naturally.

Our store is self-service. They are right there on the shelves. The consumers or customers go to the shelves and get what they want.

RE-DIRECT EXAMINATION.

THE WITNESS: While it is sometimes done, I would not say that one of the well-known ways of introducing a product is to make it look like a product already on the market. The Kellogg's Whole Wheat Biscuit does not look like a Shredded Wheat Biscuit. In fact, I would call it one, just after looking at the two, simply because I have known the Shredded Wheat for so long.

Before the window was introduced, they used a package like Plaintiff's Exhibit 155, on which I see a

picture of a dish with two biscuit in it. Seeing that, without noticing any of the other printed matter on the package, I would think it was Shredded Wheat. So it is not quite correct to say, as Mr. Clarke induced me to say, that, without the window in the back, I could not tell what was in it, if they had that picture. They did have that picture on before they used the window, and they have the picture of it on with the window.

I have seen advertising of the Shredded Wheat Company that featured a dish with two biscuit in it; and I also believe it has been advertised in connection with fruits or berries. I have seen it both ways.

RE-CROSS-EXAMINATION.

THE WITNESS: I have seen Jersey Corn Flakes, but I have not handled it. That is a corn flake. Generally speaking, I imagine it looks like the toasted corn flakes that the Kellogg people put out. I have never seen the Jersey Corn Flakes opened. I have seen Post Toasties opened. Generally speaking that is a toasted corn flake. It is very similar to the toasted corn flakes put out by the Kellogg Company. There are more than one concern putting out Oatmeal in the grocery trade; a number of them. The oatmeal put out by one concern looks generally like the oatmeal of another concern, unless there is some difference; as, I believe, the H. O. is possibly different from the others. Some of them may be specially processed; but mostly the oatmeal of one manufacturer looks like the oatmeal of another. Heinz tomato catsup looks like any other general brand of catsup. There might be some slight difference in color; but they are all tomato catsup. There are many brands of catsup on the market.

On some of the products in my store, you could find packages with pictures of a dish with some of the product in it. I know you could with beans or such as that.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not regard Shredded Wheat in the same class as catsup or beans. Shredded Wheat comes under the head of cereal or breakfast food. The original Shredded Wheat was the first thing of its kind. It was a new food product.

I know that a Kodak is something they take pictures with, a camera. Eastman is the best-known maker of it. I do not recall having seen any Kodak made by anybody else. I understood Kodak was a copyrighted word. It has become very common usage to refer to almost any small camera as a kodak, although, as a matter of fact, it is a trade name that belongs to the Eastman Company.

From my experience of more than twenty years, I should imagine that the old Shredded Wheat, the original Shredded Wheat is what the average customer would want. In fact, that is all a lot of them know, just the original Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: They would ask for it as Shredded Wheat, not for the original. They would just say, "A package of Shredded Wheat." If they wanted Kellogg's, they would say, "Kellogg's shredded wheat."

If people began buying Wheat Flakes in large quantities in my store, I do not believe it would cut down on the sales of Shredded Wheat, which is different. It would probably cut down on a similar line, similar products to the wheat flake; but I do not believe it would on a cereal as different as Shredded Wheat.

I do not find that there has been any material falling off in the sale of National Shredded Wheat in our store. That is because we pushed the National Shredded Wheat. We give it every advantage that we can. I do not know why; it is just a kind of feeling I have. It was first on the market, and it should have that preference.

I have a friendly feeling toward both concerns, because we think Kellogg's is a wonderful line. We have a big turnover on all their merchandise; but there is just the same kind of feeling about the old Shredded Wheat. Wherever I could give any advantage in display or anything of that sort to the National Shredded Wheat over the Kellogg's, I would do that. I would give the original Shredded Wheat the advantage. That is a sort of individual feeling in my own store. That is just my own personal feeling. The National Biscuit people deliver us our supplies of National Shredded Wheat. We get our supplies of Kellogg's Whole Wheat Biscuit through the jobbers.

We have, pretty generally a complete National Biscuit line. When a National Biscuit Company salesman calls on me, he takes orders for the whole line, including Shredded Wheat and the cracker line. Similarly, when a Kellogg salesman calls on me, he takes orders for the whole Kellogg line, including the Whole Wheat Biscuit. The Kellogg orders are supplied through the jobber; but, of course, we do not always wait for the Kellogg salesman, because I can always order anything they have through the jobber. If we are out of any item of Kellogg's, we call on the jobber and order it, because they all have it.

RE-DIRECT EXAMINATION.

RDQ. 158. Tell me why you feel that way about Shredded Wheat?

A. Oh, I do not know, unless it has just been so long on the market that we just figure that it is the real Shredded Wheat, is all.

RE-CROSS-EXAMINATION.

THE WITNESS: I would say that it is conceivable that other grocers would have that same feeling about the Kellogg Company as I have about the National and would prefer to push the Kellogg line.

P. F. McCARTHY.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in the public market business, embracing meats, groceries, fruits, and vegetables. Our partnership is McCarthy & Meyer, called the M. & M. Public Market, located at 1351 West Seventh Street, corner of Valencia. It is just a medium-sized business, not a super-market. It is about forty feet front. I have had it about twelve years. I have been connected with the grocery business all my life; over forty years, nearly half a century, all that time associated with the grocery business in some form. During that time, I have been, of course, familiar with cereals.

Our present store is rather a semi-service. We wait on trade, and they have the privilege of helping themselves, also. We deliver some goods, but very little. We have delivered heretofore, but very little during the last two years. We sometimes receive telephone orders and deliver.

I recognize the package, Plaintiff's Exhibit 1. I call it Shredded Wheat Biscuit. I am also familiar with the contents. I have known Shredded Wheat during the entire period of its existence on the market as a cereal. That is thirty-five or thirty-eight years. I cannot tell accurately the date. I remember when it first came on the market. It was a good seller. It has always been a very acceptable cereal. The Shredded Wheat Company or the proprietor of that Shredded Wheat Biscuit advertised it when it was introduced. The advertising of Shredded Wheat has continued throughout my recollection. I think I remember the shape and appearance of the biscuit when it first came out. I do not know that I could state that accurately.

It seems about the same. I do not think it has changed any. I think it is the same today as it was then.

I would say that the general purchasing public has always been familiar with that shape and form of biscuit. The public have asked for that biscuit as Shredded Wheat Biscuit, of course. That was the name it was known by; and it had no competitive article for a period of a quarter of a century. They did not have to distinguish it by any other name; and it was always asked for by that name. When a customer asked for Shredded Wheat, I knew what they wanted.

I remember a carton like Plaintiff's Exhibit 10, with the picture of a dish on the end of it. I would say it was used for quite a period of time by the Shredded Wheat Company. I have seen that dish and the biscuit in it used in other forms of advertising by the company.

I know the Kellogg Whole Wheat Biscuit as an advertised product. I have known of it from four to six years. It has only been on the market a brief period of years. I have carried that out at the Hollywood, and the other stores have also carried it. I do not carry it now.

Q. 36. What can you say about the Kellogg Whole Wheat Biscuit? Why is it you do not carry it?

A. I cannot say anything against the quality of it; but it has offered some demand resistance by putting it out for Shredded Wheat Biscuit; because the other product is what they expect to get.

Q. 37. In other words, have you ever had any customers—

A. Yes, sir.

Q. 38. —that showed some confusion about this biscuit?

A. Yes, sir; they bought the other in preference to it.

THE WITNESS: I think the Kellogg biscuit was sold to the grocer a trifle cheaper than the Shredded Wheat

Biscuit. I could not say that as a positive fact; but that is my impression.

I think I have seen a Kellogg package like Plaintiff's Exhibit 168, with a window in it. I have not had them in my store. Just looking at this package, supposing I could not see the name of it, of course, I would naturally presume it was Shredded Wheat Biscuits in there, by looking at it at a distance here. The similarity between that and the Shredded Wheat Biscuit that preceded it on the market is very noticeable. These are a little smaller biscuits. It is a different-sized package. The customers readily perceive the difference. They see there is a difference in the package, and they realize that it is not the package that they have been accustomed to receive for so many years. Looking in the window, I see the ends of the biscuits. I think there is some confusion of the public by the appearance of that package with the window in it, showing the biscuit. They are both sold as a similar product, of course; and one is sold as a Whole Wheat Biscuit. I believe it was sold as Shredded Wheat Biscuit at one time. Of course, merchants, during these days of small profits, are influenced to put out the merchandise that produces the best revenue. I presume that article was frequently put out where Shredded Wheat Biscuit was called for, without any additional qualifications to the package.

I think it would be easier for the Kellogg Company to introduce a product like that, now, under present circumstances, than if it were a brand new article; because a cereal of similar character preceded it on the market so much longer. It has already been well known to the public.

CROSS-EXAMINATION.

THE WITNESS: I remember Kellogg's Pep and Rice Krispies. Those products of Kellogg have really gone on the market a lot easier than Kellogg's shredded wheat. They have got a very good sale. They were

new products. They were not products that were like some other product that was on the market; yet they were introduced more quickly and easily than Kellogg's Whole Wheat Biscuit. Those goods sell very readily. Kellogg's Rice Krispies and all of Kellogg's products are very good products. I think I remember when the Toasted Corn Flakes first came on the market, generally, around the beginning of the turn of the century. I think I remember that the Kellogg corn product was first known just as Toasted Corn Flakes. There were a number of other corn flakes that came on the market under the name *Toasted Corn Flakes*. Then I remember that the Kellogg people applied the name of *Kellogg's* to their products.

Now that there are two shredded wheat biscuits on the market, I do not know whether there would be confusion between the two names Niagara Shredded Wheat and Kellogg's Shredded Wheat. I do not know that that would eliminate confusion. Of course, they could distinguish one from the other. That would, to some extent, do that. There is no doubt about it. I have not seen any effort on the part of the National Biscuit Company to avoid any confusion by calling their product anything else except just Shredded Wheat.

If I want to describe the product itself, it is Shredded Wheat. Shredded Whole Wheat Biscuit is the only name that would describe it, I think. I presume it is correct to say that Whole Wheat Biscuit is not as descriptive a name as Shredded Whole Wheat Biscuit. Whole Wheat Biscuit does not say that it is not shredded. There might be ten or fifteen kinds of biscuit that would be all whole wheat biscuits. The other is shredded. I do not know whether that term could be ambiguous or not. I suppose it is all correct.

Looking at these products of Kellogg and the National, they are both advertised as whole wheat; they are both shredded; they are both biscuits.

One of the National Biscuit men asked me to come down here today. They said they would look after my time and expense. I said I lived close by and it would not entail any expense. Of course, that is all right. I did not anticipate consuming very much time.

If I begin to have consumer call for Kellogg's Whole Wheat Biscuit, I will put it back into stock. I have no hostility at all toward any of Kellogg's products. I have regard for them, rather. I presume the Kellogg product has a very general distribution among the grocery stores in this market. I could not say as to that. I am just giving you my personal observations and experience. I found that it did not sell in competition with Shredded Wheat that had so long preceded it on the market. It was a very slow-moving item with me, so slow that I discontinued it. If it begins to move faster later on, I will put it back in the store. You have to equip your stock with merchandise that the public demands, if you want to live in business.

I advertise to the public. I put out a circular every week. I did some newspaper advertising, but not lately. It would not do me very much good. I am not a supermarket. If I were out where I could associate my business with the automobile traffic, I would advertise in newspapers. I would say that, where a market advertises Kellogg's Whole Wheat Biscuit in their newspaper advertisements, and so forth, it would help to create consumer demand in their stores for that product. So, if I did run newspaper advertisements and mention Kellogg's Whole Wheat Biscuit in those advertisements, I would have a consumer response, no doubt, to that.

The price differential between the Kellogg's Whole Wheat Biscuit and the National Whole Wheat Biscuit was just a slight one, but the motive for discontinuing the Kellogg product was simply lack of demand. I was selling the other whole wheat biscuits. As I said a

while ago, there was a little confusion. The amount of Kellogg's Whole Wheat Biscuit I sold was inconsequential, so I discontinued it. We are stocking all the Kellogg line except that.

When I speak of confusion, I have had several instances where they stated "I want the whole wheat biscuit." It was not a great deal of confusion; but, during this age of rapid transit, you do not want to have any confusion in serving the trade. You want an age of non-substitution and give them direct service, while putting out the goods called for. I do not think you could build up any real business for the Kellogg product by offering to substitute it for the National Biscuit Shredded Wheat. I think substitution is bad business. I do not think you are doing that. Substitution is not in conformity with good modern business today. Up-to-date business goes to the man who has got the supply that the trade requires. It is policy for him to put out and give them what they call for. I do not know about all instances, but I think substitution is a sort of dying institution in the trade. It would be, in our business. Those who are running a large business, such as supermarkets, can probably carry non-advertised lines and put out goods as substitutes for more specific goods; but they would be similar in quality and afford the dealer a bigger profit. I do not know whether they would meet the same trade resistance that I spoke of or not. I am just giving my own experience. I could not appropriate the experience of others and deliver it to you as facts. What I referred to as confusion in my store was that some customers said "We want the other Shredded Wheat." In that case, I gave them the other shredded wheat. That was not the reason I discontinued handling the Kellogg product. It was simply lack of demand in my store, in which I did not push or advertise it in any way. There was a lack of demand.

If the consumer asked for Kellogg's shredded wheat and I were carrying the whole wheat biscuit, I would certainly give him the Kellogg biscuit. If they said they wanted a package of Shredded Wheat, I would give them Shredded Wheat. If they said they wanted Niagara Shredded Wheat, I would give them the National Biscuit Company's product, because the National Biscuit Company product was the direct follower of the firm that preceded them, and they would enjoy the same confidence with the consuming public that they did; and I would put out the same product. I never heard anybody ask for Niagara Shredded Wheat. They just ask for Shredded Wheat.

I have never heard of Niagara Falls being associated with the National Biscuit product. The public calls for Shredded Wheat. I do not think of Niagara Falls in any way, in connection with the National Biscuit Company's product. I do not know whether where it is made enters into it or not. They call for Shredded Wheat. They never ask for Niagara Falls or anything. I have never noticed Niagara Falls in connection with the National biscuit, at all; never had any association with the demand, anyway. If anybody said they wanted the Niagara Shredded Wheat, however, I would know, certainly right away what they wanted, from the fact that the National are controlling Shredded Wheat.

I have the National Biscuit line. We have some other lines in there, too. We carry the Pasadena line; but our business is principally National products, in the cracker line. We never carry any of the National products as price leaders. We hardly ever cut on them or violate the regular price. There is quite a stability of uniformity in the prices of National products. They sell for about the same price. Even the super-markets do not cut on them very much. I do not conduct much of a cut-price store. I run some loss-leaders. I have to

do it. But I do not have any of the National products as loss-leaders, or hardly ever. We sell Kellogg's Corn Flakes at seven cents, sometimes, which would be a loss-leader, as far as adding the cost of doing business to the price we pay for it is concerned. We pay about that price for it, or a little less than that price. As far as the cost of doing business is concerned, that is a straight loss on Kellogg's at seven cents. On all those loss-leaders we are losing the cost of doing business, because they are selling at cost or some below. Competition sometimes drives them below. That is the popular method of doing business now. If you want to bring business, feature loss-leaders.

Our National line is purchased direct from the National Biscuit Company. From time to time, their salesmen call on me and take orders for the whole line, where we have business for the whole line. Included in that, they take orders for Shredded Wheat. Those orders are sold direct by the National Biscuit Company. Kellogg is selling through the jobbers, and the National deliver direct. Kellogg salesmen call on me occasionally. I have jobber salesmen call on me, also, and they would take orders for the Kellogg line, if I were out of any of it. That is the only way I can buy the Kellogg line, through the jobbers. Kellogg does not deliver direct. Under the plan adopted by the National Biscuit Company, I believe they deliver all that way. We get all our goods direct.

SIDNEY A. NELSON.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, located at 4368 Lime Street, Riverside. I have had that stand nine years.

I recognize Plaintiff's Exhibit 1. I call it Shredded Wheat, with which I have been familiar, I daresay, ever since I can remember; twenty-four years or so. During all that time I have been a consumer of it. We use Shredded Wheat all the time. We have it in our house all the time on the shelf. When Shredded Wheat is served in our home it is usually steamed; at times, with fruit or cream over it. It is not usually served in the package on the table. It is prepared in the kitchen and then served. It is brought in in dishes.

During the time I have known Shredded Wheat, both in my store and in my home, the biscuit, as I remember, has always been of the same shape and general texture.

My store is a combination of service and self-service. It is more or less a serve yourself. We accommodate the immediate neighborhood with service. We make some deliveries. We accept orders by telephone.

Our customers occasionally ask for Shredded Wheat, as in Plaintiff's Exhibit 1. That is the only way I have ever heard it asked for, Shredded Wheat. Whenever Shredded Wheat is asked for, they have always gotten what is exhibited as Plaintiff's Exhibit 1.

Shredded Wheat, in my mind, has been a recognized commodity, and such trade name given it that it is the product that, in my mind, should always be served to the public as Shredded Wheat Biscuit when it is asked for, just from, as I would say, a common law time of being on the market. I regard Shredded Wheat as a proprietary name.

I know Kellogg's Whole Wheat Biscuit. I do not carry it. I have handled the shredded wheat as put out by the Kellogg people, and I found a little confusion, at times, with the trade. Whenever they would ask for Shredded Wheat, I would give them Plaintiff's

Exhibit 1. If they saw the other package, they would ask what that was. If I would say shredded wheat, immediately it caused confusion, and they did not know, offhand, exactly what they had been accustomed to getting. They probably would ask me and depend upon my honesty to give them what they had been accustomed to getting. I would tell them that the shredded wheat in the package there was the one that had always been on the market and they had been accustomed to purchase. I carried the Kellogg product at the time when it was called Shredded Whole Wheat Biscuit. That is the time I referred to as to there being some confusion. I have carried it under the name Kellogg's Whole Wheat Biscuit. I did not notice any confusion at that time, because I never would hand it to them unless it was asked for by the proper name.

I had a conversation with the Kellogg salesman over the Kellogg biscuit. That is one reason and the main reason I discontinued the Kellogg biscuit, because of sales tactics that were not, in my mind, ethical or good business, asking not that we substitute but that we hand out Kellogg's biscuit for Shredded Wheat and that the customer would find it just as good and be satisfied. The Kellogg salesman suggested that practice to me. I do not remember his name. His face is familiar to me. He works the Riverside territory for the Kellogg people. I would know his face. I do not know that I ever heard his name. He was a man standing, probably, close to six feet, a slender face. Probably four or five years back, I think he handled your sampling crews out there, and later was promoted to sales work. His tactics in coming to the store and suggesting that manner of substituting Kellogg's biscuit for Shredded Wheat to help them get their biscuit on the market was one of my main reasons for dropping the Kellogg product.

I had my customers try the Kellogg biscuit. Such a small percentage favored it that popular demand did not warrant its staying on the shelf. The Kellogg biscuit looks like Shredded Wheat Biscuit. The tactics they are using now, that open-face package, is, in my mind, another scheme of encroaching upon the appearance of the National Biscuit Company's Shredded Wheat.

If there never had been a Shredded Wheat Biscuit and the Kellogg Company had come out with this Whole Wheat Biscuit, it would be a brand new product. It would take considerable effort to introduce it and make it popular, like any other new commodity. I am familiar with the fact that the Shredded Wheat Company has extensively advertised Shredded Wheat. I have seen its advertisements over a long period of years. The effect of those many years of effort on the part of the Shredded Wheat Company would be an advantage to the Kellogg Company in enabling it to market its biscuit. That is, they could gain by advertising that has been done by the Shredded Wheat Company in marketing their biscuit.

In my way of believing, I do not think their Whole Wheat Biscuit could be sold as a shredded wheat biscuit; but it is similar and answers a similar call.

CROSS-EXAMINATION.

THE WITNESS: The conversation with the Kellogg salesman occurred while I had Kellogg's Whole Wheat Biscuit in stock. When he told me to sell them, I believe he said to call the attention of the public to the fifteen biscuit in the cartons. I do not remember that he said anything about double toasting. He brought out the fifteen biscuit feature as one of his sales talks. He brought out that he wanted me to talk up the Kellogg biscuit, to tell people that I had a new shredded

wheat biscuit on the market; that the Kellogg Company was putting out a shredded wheat biscuit, along with this other statement.

I do not think that any business could be successfully built up in that Kellogg product by just bare substitution. I do not think there are enough merchants who would want to jeopardize their own business with methods of substitution. My opinion is that the grocer would immediately be in a quarrel with his customers. They would say that was not the biscuit they had been getting.

A customer would probably recognize the Kellogg's Whole Wheat Biscuit package as a different package than he had had before. I have used the Kellogg biscuit in my home. I recognized a difference in size. I do not know that I noticed that it was darker or more toasted than the other. I am familiar with the Kellogg Krispies and Pep. The Krispies product went into public demand very quickly. It was a follow-up of Heinz Rice-Crisps which were out first. It was a similar proposition to the Kellogg product. There is a Rice Crisp on the market, as well as Kellogg's Rice Krispies. I think it is a Heinz product, but I will not say for sure. I do not know what Heinz call theirs now. They have never sold well enough to continue to carry it in stock.

Kellogg's All-Bran was an easy product to introduce. It was a new product in the Kellogg line. Kellogg All-Bran was on the market when I started in the grocery business. The Campbell Soup line is a well established line. As to whether the existence of that line would help a competitor to get into business with a competing line of soups or retard the other man, I would say yes and no. It might temporarily. I recognize that, when a leader is properly entrenched in the business, it really does work against a new man getting into that line, rather than with him.

Kellogg's Whole Wheat Biscuit is a shredded whole wheat biscuit. I have no doubt that it is made out of whole wheat, as advertised. Assuming that the product is a shredded whole wheat biscuit, I would say that the Kellogg product was just as much a shredded whole wheat biscuit as the National product is.

I handled some of Kellogg's Whole Wheat Biscuit since the cellophane front was put in the carton. Since then I have discontinued the sale of it. When they first came out, they had one or two cartons that way packed in a case.

My store never advertises in the newspapers. I know that a number of stores do carry private store advertising. If those stores features Kellogg's Whole Wheat extensively in their newspaper advertising, that would tend to create consumer demand for that product in those stores. My store does not do any advertising of that kind.

After handling the Kellogg Whole Wheat Biscuit for a while, I discontinued it. If there were enough demand from my customers for Kellogg's shredded wheat, however, I would put the Kellogg biscuit back into stock. In that event, if customers asked for Kellogg's Whole Wheat Biscuit, I would give them Kellogg's Whole Wheat Biscuit. If they asked for Kellogg's shredded wheat, they would have to explain the difference before I would hand out a package. If a customer came into my store and said, "I want Kellogg's shredded wheat," I would tell them there was no Kellogg's shredded wheat. I would tell them there was a Kellogg's Whole Wheat Biscuit or the National Shredded Wheat Biscuit. I am quite serious in that testimony. There is a personal angle, too, underneath that; because there are customers who have traded with me such a long time that I am quite accustomed to what they want. They would say they want Shredded Wheat, if they wanted the National product.

After a customer had been saying "I want Shredded Wheat" to me for four or five years and suddenly came to me and said, "I want Kellogg's shredded wheat," I would immediately know he had misspoken or wanted a different product. I would ask him if it was this Kellogg's Whole Wheat Biscuit he wanted. I would tell them that there was no Kellogg's shredded wheat on the market.

Let me cite an instance. In the course of business, I have old customers come in for a brand you will probably recognize, Danish butter. They will come in constantly and ask me for Dane's butter. I say, "You mean Danish butter?" I know most of the customers well enough to talk pretty well with them. I would not criticize the customer for calling it Dane's butter if what she really wants is Danish butter. I would correct her in a smiling way.

If a customer came into my store and said she wanted Kellogg's shredded wheat, for some reason I do not know, it would not bring to my mind instantly that she wanted Kellogg's Whole Wheat Biscuit. I would explain to them that there are two products that are conflicting in their mind. There is a Shredded Wheat product and there is a Kellogg Whole Wheat product. They are different in size, and in the number in a package.

If they said they wanted Kellogg's shredded wheat, I would explain to them that there was the Shredded Wheat Biscuit by National and the Kellogg Whole Wheat Biscuit. Whichever one they specified, I would give them. I do not think I would finally get educated to the fact that, when they said Kellogg's shredded wheat, they wanted Kellogg's Whole Wheat Biscuit. If you had personal experience yourself in sales work in a grocery store, there is a way of getting around it. When you get a conflicting request like that, you are just as likely to take down the wrong package and

make a dissatisfied customer, as you are to get the right package.

If a customer called, and said he wanted shredded wheat, Shredded Wheat is what they would get. If a customer wanted Kellogg's Whole Wheat Biscuit and called for it as Kellogg's Shredded Wheat, and if I sent them the National Shredded Wheat and they called me and said, "You have made a mistake and given me the kind I do not want. When I called for shredded wheat, I want you to send me Kellogg's," I would explain that there were two different kinds.

I will cite you another instance. A customer keeps calling for table cream, and I keep sending it out. Suddenly she will ask for a bottle of cream. If I sent her another bottle of table cream, she would call me up and hawl me out, so to speak, for not sending her whipping cream. My customers and I seem to understand each other better than you and I understand each other.

If a well-known customer of mine would say to me, "I have tried Kellogg's shredded wheat, and I like Kellogg's shredded wheat, when I call up and say I want shredded wheat, I want you to send Kellogg's," I would say, "Yes, I can send you Kellogg's Whole Wheat Biscuit."

The next day, if that well-known customer called me and said she wanted shredded wheat, after that explanation, I would send her Kellogg's, and I would correct her again, too.

RE-DIRECT EXAMINATION.

THE WITNESS: The gist of all this examination is that I know one Shredded Wheat, one thing as Shredded Wheat. I do not recognize the right or power of the Kellogg Company to call their product shredded wheat.

It is a common thing, when a product has been for years on the market and obtained recognition through advertising and service to the public, for others to come in and attempt to sell a similar product. It is quite a common thing. The intent and effect of that proceeding is generally to bring out some ideas that are similar to the good points of the well-intrenched item.

Taking the resemblance between these two biscuits, surely, if I and most of my customers saw the two packages side by side, we would have no doubt that they are different products of different companies. It is very true that all customers are not as careful and designing as some. Frequently children are sent to the store to purchase articles. Also, a product like Shredded Wheat or Whole Wheat Biscuit frequently may be served in a dish on the table, as I have testified is the case in my home.

If two of Kellogg's Whole Wheat Biscuit were put in a plain dish and set on the table in front of the average householder or person who uses these cereals, they would know at once that they had gotten something different than Shredded Wheat. They would immediately notice it was a different product. I do not believe, however, that many would notice the difference if only one were put in a dish, because, like most people, they have certain dishes for serving certain commodities, and they would see immediately that there would be a different-sized biscuit. They would notice the different size of the biscuit. There would probably be questions the next time they came to the store, as to what it was all about.

RE-CROSS-EXAMINATION.

THE WITNESS: I came here by myself. The sales-manager for the National Biscuit Company in Riverside asked to come down. His name is Mr. Nordlund. I drove down by myself. He said my time and my

expenses would be looked after by the National Biscuit Company. I know all the National Biscuit Company salesmen who call on me. The case was not discussed, as to trying to coach or instruct me in any way. After I was asked my opinion on it, before I knew what it was all about or that there was even a case being tried, we talked about the fairness and the viewpoints on the subject. I stated what my opinion was as to the fairness of the Kellogg Company using these cellophane windows in the package. My opinion was that the use of that cellophane window is not a fair thing on the part of the Kellogg Company. I think it is unfair on the part of the manufacturer, assuming that he has a right to make a product, to put a window in it and show what the product is; because they are encroaching by getting the appearance. The end appearance of the biscuit is similar in appearance to the Shredded Wheat.

If the Kellogg Company did not put out this shredded wheat, there would be only one concern, the National Biscuit Company, to my knowledge, making that type of shredded wheat. They would have a complete monopoly of that particular type of biscuit. There would be a complete monopoly in the National Biscuit Company of what I would call a shredded whole wheat biscuit.

My feeling toward the Kellogg people is that, if they had stayed with the original biscuit when it was a round biscuit, I think they would have done more toward getting on the market than they have by trying to mimic the National Biscuit Shredded Wheat. I believe that, if they had stayed with the round biscuit, assuming that they made a round biscuit they would have gotten along better than they have by putting this pillow-shaped biscuit out.

RXQ. 164. If we assume that, under the law—and that has to be determined by the Court—the Kellogg Company has a right to make this biscuit, would you

still think it was unfair for them to make it, to take advantage of their legal rights!

A. I think it would be encroaching deliberately upon the advertised pictures or the advertising that Shredded Wheat Biscuit has spent so much money on, in advertising their biscuit.

THE WITNESS: During all the time I have been in business, I knew that the Kellogg Company has had all kinds of competition with its corn flakes. In a straight quality corn flake, I do not know of any other than Kellogg's. I have known the Jersey Corn Flakes, Post Toasties call theirs a double-thick corn flake. It is corn flake just the same, a thicker corn flake.

The common things are all in a highly competitive market. I think it is unfair to have a little competition in the manufacture of shredded wheat biscuit, inasmuch as it has just newly started, and one detriment to business today is the fact that the merchant is being practically compelled to carry so many duplicate lines. I think that, from the standpoint of the merchant, it would be to his advantage if he could just have one kind of each product.

If he had one corn flake made by one manufacturer and one wheat flake, that would be convenient to the grocer, if it could be eliminated. Apparently, however, those companies seem to have gotten enough difference in their products so that they do not object to one another's coming on the market. The ideal grocery store would be one in which we did not have to carry any duplicates to most commodities, and in which we could have one well-established product in each line. I never expect to reach that ideal, but I think it would be a pleasant ideal.

When I say I think the Kellogg Company is unfair, I mean it is unfair where they come in and take a similar design. I think it would have been nice business if they had stayed with the round biscuit. In other

words, it is fair to say that the National Shredded Wheat Biscuit was the one line in my store where this ideal had been reached, where there was a complete monopoly and I only had to carry one Shredded Wheat Biscuit, and the Kellogg Company has now come in and even destroyed that little ideal and given me two lines to carry; and I think it is unfair.

RE-DIRECT EXAMINATION.

THE WITNESS: There is no confusion in the trade between Kellogg's Corn Flakes and Post Toasties, although they are both corn flakes. The point I am trying to make is that there is confusion between the two articles known as Shredded Wheat and Kellogg's Whole Wheat Biscuit, because they are alike and because there is no great differentiation in their appearance.

RE-CROSS-EXAMINATION.

THE WITNESS: If my customers begin to ask for Kellogg's Whole Wheat Biscuit, I do not believe I will put it back in stock. If a substantial number of our customers were to keep saying "I want the Kellogg's Whole Wheat Biscuit," it would take a long time before I would want to put it back in stock. If a third of my customers said "We do not want the National; we want Kellogg's shredded wheat," if I got that percentage, I would put it in. It is just a matter of percentage of demand.

R. L. WAUGH.

Deposition taken at Los Angeles, California, February 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer. My store is self-service and delivery. It is one of the large markets in Long Beach, part of the Orange and Wardlow Drive-

in Market. I have been in that market two years. I have been in Long Beach ten years. I have been in the grocery business thirty years. For the last two years, I have had self-service. Prior to that, my stores were service stores. Besides Long Beach, I have been in the grocery business in Winnipeg, Canada, Medicine Hat, Alberta, and then Long Beach. My present store is self-service with delivery. We take orders on the telephone and deliver. I would not call it a Class A store, but it is a fair-sized grocery store. We have a very nice class of trade, among middle-class people.

I recognize the box, Plaintiff's Exhibit 1. I call that Shredded Wheat. I have known it for thirty years, all the time I have been in business, but no longer than that. I am not a user of Shredded Wheat myself, lately. We have it in the household. We have four children, two of whom eat Shredded Wheat. The package is placed on the table and we mostly help ourselves out of the package and eat it with milk or cream over it in the morning. Personally, I eat Pep.

I move about two cases of Shredded Wheat a month through my store. It is a steady seller. On the telephone, my customers ask for it as Shredded Wheat. When they self-service, they pick it up themselves. They have always asked for Shredded Wheat. That is a regular term with them. Ever since I can remember, they always asked for Shredded Wheat. I have always supplied them with the regular package of Shredded Wheat, like Plaintiff's Exhibit 1.

I know the Kellogg Whole Wheat Biscuit. We carry it. It does not move so fast. We do not get telephone orders for it. I do not remember ever getting any telephone orders for Kellogg's Shredded Wheat. We have had orders for Shredded Wheat, and I have sent them Kellogg's, and I have had it returned.

Q. 42. Have you observed, in addition to what you just said, any confusion between the two products?

A. Yes, occasionally we have a party who will bring up a package of Shredded Wheat, and I have asked them if they thought that was the Shredded Wheat. They said, "Is that not Shredded Wheat," and I said, "That is Kellogg's Whole Wheat Biscuit." "Oh, I thought that was Shredded Wheat," and they would point to the window package and then walk back and get the other package, and they said, "This is what I want," meaning Plaintiff's Exhibit 1.

THE WITNESS: That has occurred several times, in connection with the package with the window in it, Plaintiff's Exhibit 168, the package of Kellogg Whole Wheat Biscuit that shows the biscuit through a cellophane window. The customers have picked that up in my store, under the impression that it was Shredded Wheat.

Q. 48. What have you to say about the expression Shredded Wheat? Has it acquired any definite meaning in the minds of the public, in your opinion?

A. Well, the word Shredded Wheat is a household word, and it really—referring, always, to the original Shredded Wheat.

Q. 49. When you call it a household word, do you mean by that that it has become attached to that particular product in the minds of the public?

A. Absolutely.

Q. 50. Do you believe that to be the case?

A. I do.

Q. 51. From your thirty years' experience?

A. Yes, sir.

THE WITNESS: I have seen a package like Plaintiff's Exhibit 167. I have noticed the language on each end of the package, "a shredded wheat product." I have had those in my store. I should say that, when the public see the words Shredded Wheat on there, they naturally think they are getting the original package of Shredded Wheat.

I do not think that is a usual and proper method of introducing a product on the market. I, personally, would not like to have anybody put up a package like that and call it Shredded Wheat. I would say it is an infringement on the original package of Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: The Kellogg product is actually shredded wheat. I would say I have no doubt, not merely that it looks like Shredded Wheat, but that it is actually shredded wheat. I am referring to the product in the Kellogg's Whole Wheat Biscuit carton with the cellophane front. Shredded wheat is a descriptive name for that product.

I know that many grocers who handle the Kellogg product have dealer advertisements in which they mention it by the name that is on the package, Kellogg's Whole Wheat Biscuit. I would think that name is unfair. I do not know what name the Kellogg Company could give that product which would be a fair name for them to use. That would be a hard one. I would have to think that over. If you would give me some time, I might be able to suggest a name for that; but I really could not do it on the spur of the moment, not offhand, as quick as that. It would take a lot of careful study. Kellogg's Wheat Flakes would not be a good name. It is not a flake. I think it is unfair for the Kellogg Company to show, by means of a cellophane window, what they are making. I would not go as far as to say that it is unfair for them to make the product at all; but I think that, by the window package, if you were a woman in a store, and you were picking up a package of this biscuit, you would naturally think you were getting Shredded Wheat. You are not getting identically the same article but a little smaller. It is made by a different company.

If the customer wants to get a shredded wheat biscuit made by the Kellogg Company, the company ought to show her that that is what she is going to get; but, if she thinks she is getting the original Shredded Wheat, she is not. My customers or one of them picked up Kellogg's Whole Wheat Biscuit off the shelf and came to my checker to pay for it. I do my own checking-out, mostly. I would say to the customer, "What do you think you have got in this package here?" She would say, "Is that not Shredded Wheat," and I would say, "No, that is not Shredded Wheat." She said, "What is this, then?" I said, "This is Kellogg's. That is the new product that is put out by Kellogg's." I may have told her it was Kellogg's shredded wheat, and she said, "Oh, well, that is not the package I wanted. I wanted this package here," when, probably, she thought that the Shredded Wheat Company had put in this window package. The package with the name *Kellogg's* was right there. I am continuing to do that. I did it this morning. I would not say that that was rather severe pushing or switching of those customers to the National Biscuit product. I would not regard that as pushing. I just did not want the party to get hold of the wrong package. That is the only impression I would do it for. Sometimes, they have said, "Yes; well, I will try this one." Sometimes I do not succeed in getting them to put the Kellogg package back. I have no objection. They can have whichever they like, as far as I am concerned. I do not want them to take that package home thinking they are taking the other package. When they bring me the package, it is not wrapped; it is in the basket.

I think they are more likely to find out when they get home that this package is not what they wanted, than they would in my store. When they take it off the shelf, they may think it is one thing. When they get

home and think about it, they finally realize that it is not what they intended taking. This process of realization by my customers is not a slow process. It is handled pretty quickly. Both products are on the same rack, not right alongside of each other. I think there is a little something between them. I do not think I keep Kellogg's right next to Shredded Wheat. I put the Pep or All-Bran in between, so that they will not get confused. After I have done all that, so they will not be confused, I still assume they are confused when they come to the checking counter and quite often straighten them out. This is the new product, and the other is the old product. Naturally, what they have in their minds is the old product. I have only handled the Kellogg product, I think, about two years. It would have to move a lot faster than it is doing before I would consider it "grown up." After five years, if the volume went out, I would say that it had attained a "majority" in my store. It is fair to say that I put a double check on confusion. In the first place, I separate Kellogg's Shredded Wheat from the National Shredded Wheat, by putting a lot of Kellogg's products in between. Then, I check her again at the door by saying, "Are you sure that this is the package you want?" Some of the customers say "I will try this this time." I think the cellophane front in there has a lot to do with increasing sales of the Kellogg package. I would say that the cellophane front has the effect of suggesting the other, the old Shredded Wheat package. In other words, in my mind, the old Shredded Wheat package looms up as though it had a cellophane front in it. That is the idea. I have never seen one of the National packages that had a cellophane front. I get that into my mind because lately they are using so much cellophane; and, naturally, the people might think that the Shredded Wheat Company are putting up this glass front.

I think it might occur to some of my customers that this was the Kellogg Company that was putting up the glass-front package, because their name is on the package; but, when the woman is buying groceries, she does not stop to consider all those things. She just simply picks up a package of Shredded Wheat. Almost all people buy today by the eyes. I do not think a person with good eyes could tell that that was Kellogg's Whole Wheat Biscuit, not the way they buy groceries. They buy them so quick. They just simply grab a package of Shredded Wheat and away they go with it.

I do not think that any of my customers really take Davis' Baking Powder when they really want Royal Baking Powder. They distinguish them because there are two features in the can entirely different: the name and the color of the label.

With the Kellogg package and the National Biscuit package, I do not think they stop to look at the name. They just simply see the Shredded Wheat through the package, and they grab it and go.

That being so, it would be fair to say that Plaintiff's Exhibit 1 has never registered itself on the memory of the general public in any way; but, as I told you, there are so many new cellophane packages coming out nowadays that the women today buy by eyesight more than anything else. They would take the cellophane package in preference.

Assuming that the public had had photographed on its mind and memory Plaintiff's Exhibit 1 as the package they had been buying for thirty years, I do not think that they would walk up to my shelves and pick up Plaintiff's Exhibit 155, the Kellogg Whole Wheat Biscuit carton without cellophane, and think they had gotten Shredded Wheat, as much. But, the minute Kellogg puts cellophane on the front, those customers think they are getting the old package they

have been buying for thirty years, with the cellophane front in it.

I find it necessary to correct the customers at the door, because I do not want them to get home and find that they have not got what they intended to buy. I think that realization will come to them at home rather than in my store, because, on the opening of the package, they will discover the biscuit is a little different. They will see there is a different kind of biscuit in there. What they started out to purchase was Shredded Wheat, and they will find out they have taken home a package of Kellogg's Whole Wheat Biscuit.

I have had an instance on the telephone, where I have had the lady order "Send me a package of Shredded Wheat," and I have sent the cellophane package of Kellogg's out and it has been returned. They called up and said it was not what they wanted.

I have had cases where customers have taken the cellophane-front package home and have come back to me the next day and said they did not get the product they wanted. The second time they came, they said, "That is the one I took last time. I want the original Shredded Wheat. I took that home last time. I just want the other one." I have had several cases of that sort.

I never had the experience of a customer who ordered shredded wheat and got the National Shredded Wheat calling me and telling me they really wanted the other kind with the cellophane front. It is not true that most of the customers who take the cellophane-front package keep on buying it.

There has not been very much consumer demand for the Kellogg's Whole Wheat Biscuit in my store. I should think I probably sell a case every two months. That demand is a constant slow demand for that much. I do not advertise Kellogg's Whole Wheat Biscuit in

newspapers; I have advertised it on handbills. If I advertise Kellogg's Shredded Wheat, I find it creates the wrong impression. I do not know for sure whether I called it Kellogg's shredded wheat or Kellogg's Whole Wheat Biscuit. I would have to look back on my record. I think I may have called it Kellogg's shredded wheat. It is not the regular Shredded Wheat. I will allow that it is Kellogg's Shredded Wheat.

We handle the National Biscuit line and the Sunshine. I do not like carrying two brands of the same product in the particular line of shredded wheat biscuit. It would save a lot of confusion if I could pinch out this little demand for one case in two months and just have one kind of shredded wheat in my store.

I am usually the one who asks the customer whether that is really what she wants. Then, nine times out of ten, she wants the other one. I do not want her to go away with the impression that she is getting one article, when she should be getting the other. So, in nine cases out of ten, when a customer picks up Kellogg's Whole Wheat Biscuit, if she leaves my store with it, she is only one out of ten that goes out with the Kellogg product. I do not know about the demand. We sell about a case of Kellogg's Whole Wheat Biscuit every two months. It is sold to us and we have got to get the stock turned over. I will not say that I stop a customer in every case, you know. I do not stop every one that comes out with Kellogg's, because I am anxious to get rid of my stock. I do not want it to get stale on my hands.

I have recently stopped customers coming up to me with the cellophane package and asked them if they are sure that it what they want. Not just since this case came up, or since I heard I was going to testify; but, since the party got the wrong package on the telephone. I then changed my plan.

I should say that, when a woman calls me on the telephone and says "I want Shredded Wheat," and I send her Kellogg's and she sends it back, that is the same kind of thing as a woman picking up Kellogg's Whole Wheat Biscuit off my shelves and seeing it there in her own hands. You must remember, when you are in a grocery store, we have other people who will come in. Just changing once is nothing. When a man will come in, he will simply pick it up: "No, I do not want that." "Haven't you got the other Shredded Wheat?" Then you begin to think they want the other shredded wheat. There is no use fooling them on it. The other shredded wheat is right there. I do not think I would stop all that confusion by putting the two products right alongside each other; because I will tell you, sometimes you can have a thing right in front of a customer's eyes, and she cannot see it. I do not know what you are going to do in that case. You know what it is in a grocery store. Sometimes you will be looking right at the object you want, and it is not there. That is true; you can send a woman down to look at the counter, and she cannot find it. They sometimes send children into a self-service store. I would say that nine out of ten that pick up this package would think they are getting the other package.

It is true that, out of every ten customers who come to my checking counter with one of these packages of Kellogg's Whole Wheat Biscuit in their hands, when I ask them if that is really what they want, I find that none of them do not want it, and that package goes back on the shelf and those nine people take the National Biscuit package. That will stand a check-up in my store. If an investigator is sent there to spend a week, that will stand up as true; if you will let me do the questioning as they are checking out. Nine out of ten will think they are getting the original package.

My testimony was that, in the past, out of every ten people I spoke to, nine of them said, "Oh, this is wrong. I did not want this," and went back and took the other.

I am not sure, but I think I sell about a case a month of National Biscuit Shredded Wheat, thirty-six packages to the case. I have to push this other one out and get rid of it. Roughly, I should say I sell a case of the Kellogg product every two months. I have testified that, out of every ten people who come to my checking counter with Kellogg's Whole Wheat Biscuit, I turn nine of them back to the other biscuit. There are twenty-four packages to a case of Kellogg's and thirty-six to a case of Shredded Wheat. There is a difference there. If I said on the National Shredded Wheat that I sell a case, thirty-six packages, a month, it may be more than that. Of course, I would have to look up my records. It may be more than that. It does not strike me that there is anything mathematically wrong about my testimony. I think it may be two cases a month of Shredded Wheat that we sell.

I told Mr. Clarke that I sell about twelve packages of Kellogg's a month. If the rest of my testimony is true and, out of ten customers who take the package off the shelf, I turn nine customers back, then, in a month's time, one hundred and twenty packages of the Kellogg product will have been taken off the shelves and only twelve get through. That would be about right, if you get down to final figures. Nine out of ten packages that the customers try to get out of my store every month and I succeed in preventing them from taking is right.

Mr. Aspergren of the National Biscuit Company asked me to come down here. He drove down with me. I have known him about two years. He is not a close friend, just a business acquaintance. We drove down in his car. He is not looking after my time and

expenses in the case. I do not expect any compensation for my time today. I do not expect to have a check handed to me when I walk out. I do not expect anything like that.

Most products like shredded wheat are bought by the housewife, sometimes by children. I do not believe that the practice of substitution is profitable. I do not like substitution. I would not care to be sending the Kellogg product to people who order and want the National and have them in most cases send it right back, causing friction and loss of customers all the time. I only do it occasionally, if I want to get rid of an extra package. If she is not a very particular customer, I do not think the customer will care which she gets, as long as it is shredded wheat. I would not try that as a general practice, to be followed year in and year out with all kinds of goods. I would not substitute, anyway, if I could get away from it. A grocer does not get very far by substituting.

I would say that, mostly, the housewife has control of the goods that come into the house and decided what package is going to be bought. Substitution or switching has been done by housewives. Sometimes, a housewife will buy a cheaper kind of coffee and try to put it over on her husband. Sometimes she gets away with it. As to size, a housewife could get away with substitution of Kellogg's biscuit for the National biscuit on the average child or father, all right. There is no doubt about that. I do feel, I should say, that the courts should be called on to intervene by injunction to prevent housewives substituting coffee. I agree with Mr. Clarke that the United States District Courts should be called on to enjoin the housewife from switching coffee on her husband. I will agree with Mr. Clarke, that, in the main, the housewife, as the purchasing agent for the family, tries to give the family what she

thinks is the best value and what she thinks the family wants. If the practice of substitution can be stopped, as between housewife and grocer, there will not be very much trouble about the substitution as between housewife and family, I would not think.

The self-service type of store is growing in popularity in my territory. There are more self-service stores going in today than ever. It seems to be the trend of the times to go into the self-service stores.

I used to eat Shredded Wheat in my early days. I use Pep now instead. So far as younger people are concerned, it is true that there is a great deal of shifting around from time to time in demand among the cereals, as far as particular customers are concerned. A person who eats shredded wheat once does not go on forty years eating it. They change around. They get tired of one thing and they go to another. Then they go back to the first one; or, if something new comes on the market, they try it. That is not true, however, of the older people. Where it becomes a health proposition, where somebody's health depends on a certain food, the younger ones will switch around.

HENRY L. DINGEE.

Deposition taken at Fort Worth, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in the retail grocery business, operating just one service store. We are the oldest grocery store in Fort Worth, being in business since 1878. I have been connected with it since 1904 or 1905, continuously. I have not been in charge of the store all that time, but I have been a partner. My father was a partner and interested in the store before me. Since 1878, my father and I have conducted the store.

We still do a service business, with credit, telephone orders and so forth. We moved to our present location in 1924. Up to that time, we had been at 502 Houston Street.

I recognize Plaintiff's Exhibit 1 as shredded wheat, with which I have been familiar as long as I can remember, since I have been in the grocery business and before. I cannot tell exactly how long Shredded Wheat has been handled in our store, but I think I have heard father say we shipped the first Shredded Wheat into Fort Worth. No jobbers handled it at that time. It was shipped in by express a long time ago. My father died last February. Our store has carried Shredded Wheat continuously since that first shipment.

In my estimation, when the purchasing public ask for shredded wheat, that is what I think of. It is Shredded Wheat, made by the Niagara Falls Shredded Wheat Company and now by the National Biscuit Company. That has been true all the time I have handled it. It is asked for as Shredded Wheat. When they ask for that I give them this package, Plaintiff's Exhibit 1.

Q. 32. Can you tell me whether or not that name Shredded Wheat has a definite meaning in the mind of the public that purchases it?

A. In my opinion, there is only one Shredded Wheat. When a customer comes in and asks for Shredded Wheat, that is the first thing I think of, the only thing. To me, just Shredded Wheat is the name of a product, like saying the Cadillac made by General Motors. I think Shredded Wheat is made by this Uneeda Biscuit Company, or whatever you want to call it.

THE WITNESS: I regard it as a proprietary name, a trade name. I think Shredded Wheat is the name of the product.

I do not think I am familiar with Kellogg's Whole Wheat Biscuit. We did handle it, but, at present, we do not handle it, because there was not much demand for it. We put it in there, but we did not have much luck with it. I do not remember and I cannot recall handling it when it was called Kellogg's Shredded Whole Wheat Biscuit. Plaintiff's Exhibit 161, with the window in it, is the first package of that kind I recall seeing. When I see that product back of the window, it looks to me like a package of Shredded Wheat. The package looks to me like an imitation of Shredded Wheat. I believe that, with this package on the shelf, there might be confusion in the public mind.

I think the Kellogg package, like Plaintiff's Exhibit 161, might and would be sold as Shredded Wheat. Looking at the printing on one end, it says, "Shredded Wheat in its most delicious form," and, on the other end, "A shredded wheat product." It looks to me as if they are trying to sell it as Shredded Wheat. I think Kellogg's Whole Wheat Biscuit could be sold more readily as a shredded wheat biscuit than as a new product.

We use Shredded Wheat in our home. It is prepared in the kitchen and brought on the table in a bowl. We mash it up and put cream and sugar on it. There are five in the family. If, without my knowledge, a package of Kellogg's Whole Wheat Biscuit were opened in the kitchen and served on the table, I believe the members of my family would believe it was Shredded Wheat. I do not believe they could tell the difference in appearance.

CROSS-EXAMINATION.

THE WITNESS: I believe I could tell the difference. I do not know about the difference in taste. I recognize the difference in size. I believe I would recognize the difference in size of the Kellogg product.

If the Kellogg Company tell me on their package that it is Kellogg's Whole Wheat Biscuit shredded, I know it would be a whole wheat biscuit; but I do not believe it would be a shredded wheat biscuit. I believe I could tell the difference, in spite of the fact that it says on this side that it is shredded wheat biscuit. I do not believe the Kellogg Company is lying when it says it is shredded wheat biscuit. I did not mean to imply that. I said that I do not believe it is shredded wheat biscuit. I think the National Biscuit Company is the only one that makes Shredded Wheat, the trade name of Shredded Wheat. I do not think the Kellogg Company calls it shredded wheat. They do call it, on this package, very prominently, Kellogg's Whole Wheat Biscuit. That is the only name I have known it by. I believe that is the first time I have ever seen that package. Mr. Vilas asked me whether this did not look like Shredded Wheat, and I said it did. They are not shredded wheat. They are made out of wheat. They are shredded, all right. I do not think they are Shredded Whole Wheat Biscuit.

The Kellogg Company at Battle Creek, Michigan, could make shredded whole wheat biscuit, all right. If they made it, I suppose it would be a shredded whole wheat biscuit, physically speaking. I suppose they could make something similar to that, all right, and call it the same thing.

I do not remember eating or tasting some of Kellogg's biscuit. I do not believe I have. In fact, I hardly ever eat Shredded Wheat. I very seldom eat either product; just once in a while.

I handled the Kellogg product for a while but discontinued it, because I did not find there was any demand. We do run advertisements. I never advertised Kellogg's Whole Wheat Biscuit, to my certain knowledge. I do not recollect it. I have advertised

the National Shredded Wheat, Plaintiff's Exhibit 1, because we handle that and sell it. I surely think that my advertisement of it would tend to create a demand for it. I know that advertising tends to create a demand among consumers. I am sure that, if I advertised Kellogg's Whole Wheat Biscuit in the same way I have advertised the National Shredded Wheat Biscuit, it would create a demand for the Kellogg product. We did not drop the Kellogg product because we did not advertise it but because there was no demand for it.

Our store is located in Fort Worth, and there are quite a few self-service stores in that Fort Worth market, more than there are service stores, many more. I have never considered turning my store into a self-service store. It is such an old organization that we are going on from now on in the old way. There are no self-service features whatever to my store. Of course, there are some people who come back behind the counters, some old-time customers, who come behind the counter and help themselves, once in a while. The new-time customers, although used to waiting on themselves in other stores, do not do that. I think it is just the old-time customers. It seems to me that the table and counter in front of our shelves kind of bar them and they do not go behind them. Just the old-timers do. People who are used to the new self-service stores stay on the other side of the counter. They do not ask whether we have Kellogg's, or any other name that it could have been known by.

When we handled it, if a customer asked me for Kellogg's shredded wheat, I would give her that product, the Kellogg's Whole Wheat Biscuit. Plaintiff's Exhibit 161 is a very nice package. It looks more modern than Plaintiff's Exhibit 1, but this Niagara Falls package has been the same ever since I can remember. I do not know whether there has been any change in it.

I know what the National biscuit is. I have seen them made. If somebody asked me what it was, I would say it was an oblong, kind of pillow-shaped biscuit, made with long threads. We had a demonstration in our own store long years ago, and I saw it made.

XQ. 121. Oh, you call those shreds threads?

A. Threads.

XQ. 122. You would not call them shreds?

A. No, I would call them long threads the way, if I remember right, they came out.

XQ. 123. So that you would really call it threaded biscuit instead of shredded wheat?

A. Well, of course, I probably would not call it that; but that is what it looked like. In my mind, it was kind of cut up, like shredded cocoanut or shredded codfish, or something like that. I do not know whether I ever heard of shredded cabbage or not. I would expect shredded cabbage to be in long strings, as long as you could get it out, in cabbage. Shredded cocoanut is cut up in little bitty pieces, like that.

Noticing on the individual Shredded Wheat package, Defendant's Exhibit 1, a phrase in quotations on the side, "As made since 1893. It's all in the shreds," I understand the word shreds there to refer to those long threads of wheat. I have no doubt of that.

If I were asked by somebody, "Just what is shredded wheat?" and I said, "It is a biscuit made out of wheat that is shredded," that would, I think, describe it.

I know the Piggly Wiggly stores. They are self-service stores. I believe they started in Memphis and scattered pretty much among the southwest territory. I understand some of the self-service stores are coming into the east. I believe that type of store is on the increase, that that is the present trend, service stores being changed to self-service.

My father was very well acquainted with Mr. C. W. Post. Mr. Post, I believe, started his business in this section, at Fort Worth. Our store stocked Post Toasties, and I believe we were the only dealer in the United States buying them direct. We do not still buy them direct, but we were doing so at a time when others could not get them direct. I understand Post Toasties are toasted corn flakes. We also handle Kellogg's Corn Flakes. We handle Kellogg's Krumbles and a few other things. I do not know whether we handle the complete Kellogg line. Post Toasties outsell the Kellogg Corn Flakes in my store. We do not now push the Post product more than Kellogg's Corn Flakes. We used to. It was kind of a personal matter. There used to be a personal feeling there. My father and Mr. Pest were great friends. We bought Post Toasties direct just through that friendship. We never had any hard feelings against the Kellogg's corn flakes. It was to our interest to push the Post product more. I have absolutely no feeling against the Kellogg Company now. We stocked the Kellogg's Whole Wheat Biscuit right away and continued to stock it until we found there was not sufficient demand for it. I do not recall advertising Kellogg's Whole Wheat Biscuit. My father may have done so. If there should be a demand in my store, customers coming in and asking for Kellogg's Whole Wheat Biscuit or for Kellogg's shredded wheat biscuit, I would stock it up again. I do not know, of my own knowledge, one way or the other, whether Kellogg's Whole Wheat Biscuit is pretty generally stocked by other stores.

I would say, however, that advertising of Kellogg's Whole Wheat Biscuit by other stores around me and the sampling of that product to the consumer naturally would tend, in the long run, to create a demand for Kellogg's Whole Wheat Biscuit. As soon

as they did create a demand for it, I would stock up with it again.

I do not believe I would say that it is generally and widely known in our market that there are now two concerns making this shredded wheat biscuit. I do not think the Kellogg product is well known as a whole wheat biscuit. I would be surprised if men who are in a position to know would tell me it has a distribution of as high as 75 or 80 per cent. in other stores. I am not really familiar with conditions in other stores. I have not gone through self-service stores. I do not know that practically all those stores carry the whole wheat biscuit. I could not say whether they did or not. So my opinion that the Kellogg product is not well known in this market is based just on my knowledge from the customers who come in. They will ask for a package of Shredded Wheat; they will not say Kellogg's. They want Shredded Wheat, and they seem to know what they want; so it must be pretty well known there is just one Shredded Wheat. That is the way it seems to me.

It is true that that statement is based just on conditions in my one store.

RE-DIRECT EXAMINATION.

THE WITNESS: I think the proper description of this product, Shredded Wheat, is threads of wheat, and the term shredded is more or less erroneously applied to it. So, by the application of this fanciful name to it, he has given a designation to his own product.

As far as I can remember, the package, Plaintiff's Exhibit 1, has had the same general appearance for a great many years. I do not know whether these letters used to be black or not; but it was in the same size package, I know.

Looking at Plaintiff's Exhibit 10, I recall that package with a picture of a dish on the end of it. I would say that package, with the dish on one end and Niagara Falls on the other, was used for a long time. I associate this picture of a dish with two biscuit in it with Shredded Wheat, and I think the purchasing public does, also.

I see a picture of a dish with two biscuit in it on the reverse of Plaintiff's Exhibit 161. If a person saw that picture on that package, the name being obscured for one reason or another, I think they would think that it was Shredded Wheat. I think that, aside from modernizing the package, as Mr. Clarke has suggested to me, there is value in the old, well-known package and that it has a distinct good-will value in the trade. It is that old established package, as I remember it; and, every time you have that up, you think of shredded wheat. It has been sold for a great many years, to my knowledge.

My father's friendship for Mr. Post is a thing of the past. I do not know whether Mr. Post is dead or not; but I believe he is. So far as that had any influence on our merchandising, that is all a thing of the past, absolutely. I have no prejudiced feeling against Kellogg or for the National Biscuit Company or against them in this matter. I really do not know what this case is all about.

RE-CROSS-EXAMINATION.

THE WITNESS: I recognize the Whole Wheat Biscuit package as one of the family line of Kellogg's packages. I recognize Kellogg's name on there. I believe that is on all their packages. I think the consumers would recognize the Kellogg name. Their name is on there just as prominently as it is on all their packages, Corn Flakes, and all. I do not mean to say that I would

confuse this package; but I believe I would this part of it with the dish. When I see it, I see the whole package. I do not mean to say that my attention is so clouded that I just see the plate and do not see anything else on there. If I look at the Kellogg package, I think of Shredded Wheat. I think the Kellogg product is threaded wheat; but I do not think it is the threaded wheat I have had in my mind. I think of just this one package there, Plaintiff's Exhibit 1.

The picture of the plate with the biscuit in it would make me think it would be a package of Shredded Wheat. I think that is shredded wheat, all right. If I arrived home with that package and found it was whole wheat in biscuit form, shredded, I would not bring it back to tell them I thought I was going to get shredded wheat and I had gotten oat flakes, or oatmeal, or something of that sort; but I would not think I had gotten what I called for. I would not think I had gotten shredded wheat biscuit. I would think I had gotten something else, like shredded wheat, probably made out of wheat. I would think it would be Kellogg's Whole Wheat Biscuit. It is on the package. That is what it would be.

Our store would like to get down, of course, to one brand of each article, if we could; but, you know, we cannot have that. I have no prejudice against duplicate brands, so far as there is a demand for both products. It is a fact that almost everything we have in the store has some companion brand. If we have one brand of ketchup, you will have another. We generally have Blue Label. It is true, however, that almost every brand of product has some companion product that is made by some competitive concern.

I would not say that the Kellogg product is a competitive product to the Shredded Wheat, I do not believe; because, in my mind, that is the only Shredded

Wheat. I do not like to say it, but I think the Kellogg biscuit is an imitation, but not a competitive imitation. By imitation, I mean it looks like Shredded Wheat and is called Shredded Wheat on the side; that it tastes like Shredded Wheat and I have no doubt it is made out of wheat shredded and put into the pillow-shaped biscuit form. It could be a real shredded wheat, but I mean I think it is copied after this other one. I do not mean anything in the nature of a fake; I mean just a product made like this one, probably the same thing.

RXQ. 226. Yes, probably the same thing. Is it not a sort of companionate or competitive product, just like the two brands of ketchup? They do not always just taste alike, do they?

A. Well, I kind of feel like if a concern would make a car, a Ford, and another concern would make a car and call it a Ford, it would not be a Ford. That is just the way I feel about it.

THE WITNESS: They have got Shredded Wheat on the end of the Kellogg package; but they call it Whole Wheat Biscuit on there. If the National Biscuit Company called their product in small type whole wheat biscuit, I do not think that would make it unfair competition with Whole Wheat Biscuit. It is shredded whole wheat biscuit. It is surely a whole wheat biscuit. It is whole wheat biscuit; but it is not prominently advertised on the package as whole wheat biscuit. The Kellogg product is so advertised. The main prominent features on the package are the words Kellogg's Whole Wheat Biscuit.

The machine demonstration in our store that I spoke of referred to small machines that actually made shredded wheat biscuit. They shredded out the wheat and formed the biscuit, too. I do not remember now whether they baked the biscuit or not, it has been so

long ago. I never heard anything about Mr. Perky, the inventor of the biscuit, originally intending to make little machines for making it in the homes. I never had any demonstration in my store on Kellogg's Whole Wheat Biscuit. I do not remember having put any sales effort behind Kellogg's biscuit. I never had my salesmen explain that there were more biscuit and smaller biscuit in the package, and that it was made by a new concern. I just put it on the shelf, without putting any advertising behind it. We advertised Kellogg's Corn Flakes, so you see we do not have anything against Kellogg's. We did not put any sales efforts behind Kellogg's Whole Wheat Biscuit to advertise it. If they call for Kellogg's Whole Wheat Biscuit in my store, I will stock it up again.

RE-DIRECT EXAMINATION.

THE WITNESS: The old Shredded Wheat Company put a lot of effort into pushing this product. It was a brand new departure in cereal products and required a great deal of educational propaganda to get people to use it. I know there must have been a great deal of money spent on this little machine, and so on, pushing it. As I remember, they put out all sorts of pamphlets and literature telling the public how to use it. I feel that all that sort of effort has had the result of making it a sort of household word. I feel that way about it. When I told Mr. Clarke I thought the Kellogg product was an imitation of shredded wheat, those were the considerations I had in mind. I did not mean any hard feelings or anything like that.

RE-CROSS-EXAMINATION.

THE WITNESS: It is generally like the biscuit, I am sure, made of whole wheat and shredded and put up into pillow-shaped form. There is no doubt about

that. It looks like Shredded Wheat and can be used as Shredded Wheat. This biscuit, I concede, is whole wheat, shredded and put up in pillow-shaped form.

RE-DIRECT EXAMINATION.

THE WITNESS: A man might make an automobile that looked exactly like Mr. Ford's product, but it would not be a Ford; and a man might make a Kodak, but, not being an Eastman, it would not be a Kodak. That is what I had in mind. It might be exactly the same product as the original, but I do not think it would be fair to call it that. That is the sum and substance of what we have been talking about. That is what I have been trying to tell you.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not remember instances where a man like William H. Baker put out a Baker's Chocolate, in the shape and form of the original Baker's Chocolate, to be put off on people who would think they were getting the original Baker's Chocolate. I do not remember any of those fraudulent imitations. They have not been as frequent in recent years, since the courts have been enjoining fraudulent imitations of that kind. I do not mean to say that consumers cannot tell the Kellogg package and the National package apart. The packages are similar.

RE-DIRECT EXAMINATION.

THE WITNESS: I can tell the packages apart when I see them. Some of my customers might be confused if they would see one package without the other.

RE-CROSS-EXAMINATION.

THE WITNESS: They might and they might not; that is true. There are people who might be confused about it. I will concede that this Kellogg Whole Wheat

package is just as distinctive as any other Kellogg package. Anyone who might take that as one of the Shredded Wheat packages might also pick up a package of Kellogg's Corn Flakes and think they were getting a package of Shredded Wheat, I think.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not attempt to pass opinion upon the legal aspects of the case, as to whether fraud exists or does not exist.

RE-CROSS-EXAMINATION.

THE WITNESS: I have not heard of fraudulent imitations in recent years. I did not hear that there were imitations of Royal Baking Powder, Baker's Chocolate, or Rogers Silverware. I did not hear of a man named Frank Royal who put out Frank Royal's Baking Powder. In my experience as a grocer, I never heard of that kind of imitation. I do not remember any.

ALVIN J. LEE.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, with a service store, no self-service feature. I have been in the grocery business about twenty-five years, always in Forth Worth. I am the owner of the store. I have owned the store twenty-five to thirty years. I cannot remember that far back.

I recognize the package, Plaintiff's Exhibit 1. I call it Shredded Wheat. I am familiar with the biscuit inside it. I have known it since at least twenty-eight years ago. I have been married that long. I was then working for Pittman, and I used to buy it

by the dozen packages then. At that time, it was a well-known product. Then and since, I have carried it in my store at all times. I have never been without it. There is a demand in the trade for that product. My customers ask for it as Shredded Wheat. When a customer asks for Shredded Wheat, she gets Plaintiff's Exhibit 1.

The reputation of shredded wheat in the public mind is excellent. When my customers hear the expression shredded wheat it means to them that package, and quality. I never had a package returned yet, except that, once in a while, you get a buggy package in hot weather.

I know Kellogg's Whole Wheat Biscuit, and I carry that in my store. We have handled a few in about the last year or so.

I use Shredded Wheat some in my home. When it is served there, my wife does not bring the package on the table. It is usually served in a dish with cream.

When I see a package like Plaintiff's Exhibit 161, with a window in it and biscuit, seeing those articles through the window, it has the semblance to my mind of Shredded Wheat.

I know of Shredded Wheat in a package like Plaintiff's Exhibit 10, with a picture of a dish on the end of it. I would say I have been familiar with that package for a very considerable length of time.

Noticing the picture of a dish on Plaintiff's Exhibit 161, supposing I or one of my customers would see that package, with the name obscured, that would suggest Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: I still carry Kellogg's Whole Wheat Biscuit. That product is now known in my store as whole wheat biscuit. It is a little smaller biscuit than

the regular Shredded Wheat. I would not call it shredded wheat. It is a similar biscuit. If any of my customers asked for Kellogg's shredded wheat, I would give them Kellogg's Whole Wheat Biscuit. If they asked for Kellogg's shredded wheat, I would ask them if they wanted Kellogg's Whole Wheat Biscuit, and I would expect them to say yes. If they would come in and ask for Shredded Wheat, I would not give them Kellogg's. If that is substitution, I would not substitute.

I recognize the Kellogg Whole Wheat Biscuit package as one of the general family of Kellogg packages, by the red and green colors, and it says "Kellogg's." With the name on it, I would recognize it as one of the family of Kellogg packages. I do not remember seeing any of the whole wheat packages that did not have the Kellogg name on it in big red letters. I am rather inclined to think the Kellogg biscuit is smaller in size than the National Shredded Wheat. I do not know whether it has the same number of biscuit in the package.

It has been some time since I advertised Shredded Wheat like Plaintiff's Exhibit 1. My store does advertise certain products. We have advertised the Niagara Falls Shredded Wheat. We have never advertised Kellogg's Shredded Wheat. There is no particular reason why we have not, or why we did advertise Shredded Wheat.

I do not know whether we have had any demonstrators of Kellogg's shredded wheat in our store. There are so many of those things that I do not remember. I do not believe we have. I remember their having a demonstration of corn flakes, about 1920, before they came out with the whole wheat biscuit. We have advertised their Corn Flakes and other products but not Kellogg's Whole Wheat Biscuit. I do not know

any reason why I would not advertise Kellogg's Whole Wheat Biscuit, if I thought conditions were ripe for it.

Piggly Wiggly is a self-service type of store. If I remember correctly, there are about seven hundred and eighty-five food establishments in Fort Worth. Piggly Wiggly has about twenty. Help Yourself had seventeen, I believe, before they began to cut down. The A. & P. is about fifteen or twenty. There is one Safeway store there. That is the same as the Piggly Wiggly. I have made a study of the situation and I know that it is not a fact that the trend is more and more toward the self-service store. If other witnesses have testified that the trend was toward the self-service store, I would say they do not know what they are talking about. The statistics do not show it.

If I were told that the Handy Andy Stores management say they have changed over sixty-five per cent. of their stores and are changing others as rapidly as possible, I would say that they did not know what they were talking about, in Fort Worth. I do not know about the country outside Fort Worth. I would say service stores are doing sixty-five per cent. of the business in Fort Worth. It is easier for me to get a customer from a chain store now than it was before. The new stores going in have all been service type. Self-service stores are going out instead of in. They are closing up stores. Hardly a week goes by that A. & P. or Piggly Wiggly does not close a store. I think the pendulum is swinging back to the service store.

I do not know about conditions outside Fort Worth, except what I read. The new stores in Fort Worth are all self-service stores. I have seen the several new stores. My own store has no self-service features. We will permit them to pick out what they want but we prefer to wait on them. I can sell Mrs. Murphy twenty-five per cent. more than she will buy, if her credit is good. That is why I like the service feature.

I made no particular effort to sell them Kellogg's Whole Wheat Biscuit. I could sell them if I wanted to. My present store is twenty-five by eighty, but I need fifty by eighty.

I know the Wyatt store and I have been in it. It takes some time to sell customers twenty-five per cent. more than they want. Ninety per cent. of my business is over the telephone. I can increase the demand over the telephone, surely, by suggestion. If your wife called up and ordered Shredded Wheat, I would immediately ask her if she wanted cream. If she ordered lettuce, I would ask her if she needed mayonnaise. In that way I increase sales. I would call it salesmanship. In such a store as Wyatt's, a woman walks around and takes what she wants; but they follow them around and even carry baskets. You used to carry your own sack. Now, they even make deliveries, I suppose, here. In Fort Worth, practically all chain stores make deliveries. Managers even carry accounts. That is a result of depressed conditions. They are not so independent now and a little more anxious for business. The A. & P., Help Yourself, and Piggly Wiggly are in the same block with me. I do not know what business they do; but I have been in business a long time. I watch them and I believe I am doing as much business as all three of them.

If they have merit, I introduce new products into my line from time to time. My custom would be to tell customers I have a new product, the merits of it, and the price. I will cut the package. If she asks me how many pears are in a can and I do not know, I will dump a can and count them. I regard that as good business and a service to the customers, if it has merit. Those methods are a legitimate means of bringing a new product to the attention of customers. It is the only way you can do it.

Sometimes, a manufacturer samples a new product from house to house or advertises it, as well as having dealers advertise. Very few of them ever give a dealer anything for advertising. Most of them encourage the dealer to advertise for them. The manufacturer is always trying to get the retailer to build his business for him. When I advertise Shredded Wheat, that is at my own expense. The Shredded Wheat Company did not tell me to do that, that I know of. I believed we did football it, at one time. That does not do much good. It would not help it with me. When they begin to football it with me, I knock it out. I will not tell them it is no good; but I will try to sell them something else just as good. There is nothing illegitimate about that, if it is true. If a customer asks me for any specific item, I never try to change her. If she asks for Shredded Wheat, Beard's Bread, or Heinz's Pickles, I give her what she wants. If she insisted she wanted Heinz's pickles, I would not argue with her; but, if I could make more money on another brand, I would not keep quiet about it. I do not work for nothing; my health is pretty good. If I had the same margin of profit, I would see no advantage in changing them. If I had a bigger margin of profits on Campbell's Pickles, I would try to sell them. The profit is about the same on Shredded Wheat and Whole Wheat Biscuit.

The first time we had Kellogg's biscuit, Mr. Strong, a personal lifelong friend of mine, asked me to try to sell it. I ordered two or three cases of it. It sat on the shelf for quite a while, and I quit it. We just carried a few to accommodate those who demanded it. We have it in stock now, probably half a dozen on the shelf. We have no objection to profit competition between manufacturers. That is their fight. They all do it. The Kellogg Company, on Whole Wheat Biscuit never gave me anything.

Mr. Mays, manager of the National Biscuit Company, invited me here today. I have handled their entire line for several years. Before theirs, I handled Brown's cracker line, but I do not now. I have handled Morton's Salt ever since I have been in the grocery business. I never change. I can get other salt cheaper. I can get five per cent. on other lines, but it would cost me more to sell it. Sometimes there is an advantage in price, but I would not change. I have the same matches, snaps, macaroni, salt, and toilet paper I have handled ever since I have been in business. I might change or ease into another product, if there were every kind of advantage to it, if the sales resistance were not too strong, and I could put it over on the housewife. I have never been able to get anything from the National Biscuit Company except just the standard discount. They have made no special inducement to me to put in their line. Just the regular seventeen and a half per cent. discount. I would like to know if they have anything lower. I have never been offered better by anybody. I have tried to get a better discount but could not get it. I still think they give the chains more. I am satisfied but not contented with the situation.

RE-DIRECT EXAMINATION.

THE WITNESS: I get fifteen cents for Shredded Wheat. I do not remember what we get for Whole Wheat Biscuit. With about thirty-five thousand dollars tied up in the grocery business, I naturally study it and inform myself of conditions. What I have said about conditions in Fort Worth are correct. I get my statistics from jobbers. I make observations for myself and know about the volume of business. I think the self-service fad is running its course and is going back. There is still a fertile field for the service grocery.

I think the manufacturers, as well as jobbers, are beginning to realize they erred in making the chain-

store possible. Ninety per cent. of the jobbers are broke. They are quitting business. They made the chain stores, running after them and giving them everything they had to start with, getting down to where they could not pay their bills. Then the chain stores put in their own stores. I think the manufacturers have been giving them special discounts. They are getting sick of it. There is nowhere for them to go, except the service store. Service is really the backbone of the grocery business, I think. Ninety per cent. of the people would buy from a service store, if the price were equal. I have about four hundred people who buy from my service store and do pay the price.

My first impression of the Whole Wheat Biscuit was that, when Mr. Strong sold it, just by looking at it, I drew the conclusion that it was shredded wheat. Afterwards, I found out it was a whole wheat. I do not remember if he told me it was a shredded wheat biscuit. It is possible he did. I do not think he would intentionally, because he would know I would know better.

RE-CROSS-EXAMINATION.

THE WITNESS: Kellogg's biscuit looks as if it were shredded. Very few self-service stores in Fort Worth are independently owned. I would not call the Wyatt store in Dallas anything else but a chain store. He has been associated with chain stores ever since he has been in the business. I do not know of any other Wyatt stores. I would not call it a chain system if he had only one store. The self-service type of store, I am sure has passed its peak and is going the other way. There may be a few individually owned, but most of them are chain stores.

I think the big chains are on the decline. It is not my observation that the National Biscuit Company's products have been used notoriously as price leaders or loss leaders in recent years. I do not see Uneeda Crack-

ers or other National items advertised a great deal. I know the A. & P. sold them pretty scant. The best we can figure is they take their discount without the profit.

I would not be surprised if the National did not object to price cutting if it did not go below trade cost. They might not like it, but I do not believe they would say much about it. My experience with manufacturers is that distribution is about all they want.

I have not been giving stuff away in my own store. I am going to get a profit every time it goes out of there. You can gamble on that. I do not accommodate with anybody. That sort of price-cutting wipes out profit. Loss-leaders are a method of getting people into a store; but I do not cut anything below its cost. I always make some profit on it. If I make an attractive price it is not particularly to bring them but to keep those I have satisfied. If I have three or four specials advertised, it might not attract one more person to the store, but it leaves a better taste in the customer's mouth.

I think I am in a good competitive price range of the market. Just by advertising something, you will stimulate the sale of it. Advertising Morton's salt, one day, at regular price, we sold twenty-five times as much as we would ordinarily.

I do not know which is the most modern packages, Plaintiff's Exhibit 1 or Plaintiff's Exhibit 161. I do not think the cellophane-window feature is old-fashioned. They seem all to be going cellophane crazy. That is a modern, up-to-date package.

I have seen Plaintiff's Exhibit 1, ever since I have been in business. It has not been modernized in the sense of having glassine in it.

RE-DIRECT EXAMINATION.

THE WITNESS: The old package of Shredded Wheat seems to have some value. There is something that

makes it sell; I do not know what it is, whether it is the package or what is in the package. It just seems that it is instilled in the minds of the public. Shredded Wheat is what they know and what they ask for. We will sell a hundred times as much Shredded Wheat as we do the Whole Wheat Biscuit, in spite of the fact that the Kellogg package is a modern package and Shredded Wheat is an old package.

MRS. IMA BULLOCK.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

I am a housewife, living in Fort Worth. I am familiar with Shredded Wheat. I suppose I have been using it practically all my life. I have purchased it often. I patronize independent service groceries. I do not order by telephone. I ask for Shredded Wheat. I always picture a package like Plaintiff's Exhibit 1. I have seen that all my life, and I always think of Shredded Wheat in that form.

I have ordered Shredded Wheat and gotten something else, at Donnelly & Walker's, in Fort Worth. It is not a store I am used to going to. Mr. Gordon Pittman, a salesman of the National Biscuit Company, asked me to go there. I asked for a box of Shredded Wheat. He brought a package. I looked at it and said, "Is that the regular Shredded Wheat?" He said, "No, this is Kellogg's." Then I asked him if it was the same thing. He said, "Yes, the same thing"—only that there was more of it. I took the package, paying fifteen cents, the same as I usually pay for Shredded Wheat. Plaintiff's Exhibit 182 is the package I got there on February 1st. That is the only experience I have had with the Kellogg product.

CROSS-EXAMINATION.

THE WITNESS: That is the only store Mr. Pittman asked me to go to. I went there alone. I brought the package back and gave it to Mr. Pittman with the contents. I had the full package until just a little while ago. It was bothersome to carry, so I took out the biscuit. I gave them to the porter in the hotel. He took them.

I have never tasted the Kellogg Biscuit. That is the first time I heard of it. As soon as the Kellogg package was produced, I know it was not the package I had been getting for years. That is why I asked him. He did not say it was different, but I understood it was. He said it was made by the Kellogg Company. I had heard of Kellogg's before then. I use the bran and maybe other products, not corn flakes. I know the name of Kellogg. I met Mr. Savage, one of the attorneys for the National Biscuit Company, today for the first time. I talked with him about this case.

That is my only experience with Kellogg's Whole Wheat Biscuit. I have never tasted it. I cannot see anything in it.

I only deal with service stores, never with self-service. I have been in self-service stores, but I do not trade with them. My husband is in the bread business, Mrs. Beard's Bakery, in Fort Worth, and I believe in trading with home institutions, if I can, because he wants people to deal with the home bakeries. My store, across the street from my home, is a service store. He carries Shredded Wheat. He carries other Kellogg products but not the Whole Wheat Biscuit. The store Mr. Pittman sent me to does carry it. I do not know whether it carries Shredded Wheat. He did not offer it to me when I asked for it. When I asked for it, I thought that, if he had it, he would give it to me; but he did not.

HOWARD P. BURKE.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am not connected with the National Biscuit Company in any way. I am familiar with the product known as Shredded Wheat. I have been a user of it. I could not say offhand how many years; but I can remember eating it as a child. I have known it as Shredded Wheat, which term has not meant anything else to me but this product.

I have purchased Shredded Wheat at restaurants sometimes. I ask for Shredded Wheat. In one instance, when I did that, the young lady brought me a box of Kellogg's Whole Wheat Biscuit. I had asked for Shredded Wheat, so I asked her, "Is that Shredded Wheat?" She said, "Yes, sir." I looked at the box. I said, "It says 'Kellogg's Whole Wheat Biscuit.'" She said, "It is the same thing." I said, "Is it?" She said, "Yes, sir," and I ate it. This occurred yesterday at the Texas Hotel Coffee Shop, Fort Worth. That is the only experience of that kind I have had, to my knowledge, when I was looking for that product. I was always under the impression I was getting Shredded Wheat when I bought it.

I remember Kellogg's Whole Wheat Biscuit having been served me for Shredded Wheat a number of times. I am often on the road, traveling. I know that the product has been known as and bought for Shredded Wheat for many years. I have with me and produce the particular package served me yesterday, which is Plaintiff's Exhibit 183. Someone connected with the National Biscuit Company asked me to get this. I would say that, although this may have happened to me before, this was the first time I realized I was not getting the Shredded Wheat I asked for. When I got

it, I recalled that I had previously had the biscuit served to me in the small package.

I was familiar with the large package of Shredded Wheat before. I had had occasion to purchase it in store. I have never seen an individual service package of Shredded Wheat, that I know of.

CROSS-EXAMINATION.

THE WITNESS: Yesterday was the first time I was ever conscious at the time of getting Kellogg's biscuit. After getting it yesterday, I knew that I had gotten the Kellogg biscuit a number of times before but had not realized it. I have always had it served in the same way, in the individual cartons. I have noticed it before, because I have had business to do with a firm connected with Kellogg's. I am in the garment business, and I have made uniforms for men who are distributing Kellogg's products. Naturally I remembered the name "Kellogg's." I asked for Shredded Wheat in restaurants, but, although I did not realize it at the time, I know now that, in those instances, they brought me Kellogg's carton. I only just had occasion to notice. I am pretty observant. I had never noticed Shredded Wheat in the small box before. I think that is one of the reasons I may have been conscious of the fact it was Kellogg's. From the time I have been served with the small carton, it has been a carton like the one shown me, the Kellogg carton, as far as I remember. I have never been served with any other kind of carton for Shredded Wheat except this red-and-green carton. I have had Kellogg's products, like Rice Krispies, but not Shredded Wheat. I could not say that I have ever had Shredded Wheat served to me in a carton like Defendant's Exhibit 60. I do not remember ever having any like that. I do remember having had other servings in the Kellogg carton, like Plaintiff's Exhibit 183. I can remember Plaintiff's Exhibit 1 when I was a young-

ster, being served at home. The reason I remember Kellogg's is that it was prominent on that package. I did not pay any particular attention.

XQ. 46. This is your package of Kellogg's Whole Wheat Biscuit. That is the package that you remember being served to you; is that right?

A. No, sir; that is Shredded Wheat.

THE WITNESS: Each time Kellogg's Whole Wheat Biscuit has been served to me, I have eaten it. I ate it for shredded wheat. It looked like shredded wheat biscuit, and it tasted like it. I called for Shredded Wheat. That is what I thought I was getting, because I did not look at the package. I was buying Shredded Wheat. I bought it as Shredded Wheat. On this particular occasion yesterday, it was served to me as Shredded Wheat. I should imagine Shredded Wheat would be a product by itself. That is what I mean. I do not know. Shredded Wheat seems to me the picture on that package right there. Looking at Plaintiff's Exhibit 161, if I should see the biscuits down there that look like Shredded Wheat, I should imagine that would be Shredded Wheat. I see "Kellogg's" down there. If I did not, I would take it to be whole wheat biscuit, if I saw that picture. If you would put it on a plate, I do not think I could tell the difference between Whole Wheat Biscuit and Shredded Wheat.

I am familiar with the old biscuit, such as are contained in Plaintiff's Exhibit 1. There is a difference in the size of the Kellogg's biscuit, I imagine. I noticed the Kellogg biscuit is a smaller biscuit than the other.

I could not say whether it is physically impossible for anybody other than the National Biscuit Company to make or manufacture that product that is in Plaintiff's Exhibit 1. I think that anybody can duplicate anything anybody else does. If they did, it would be

the same thing, in the product itself. If they duplicated it and it were made of whole wheat, shredded, and put into biscuit form, I imagine you would call it shredded whole wheat biscuit. It says on the bottom, "Shredded Whole Wheat." I think that is a true statement.

I do not know any other way to describe the biscuit in that package except shredded whole wheat. To be frank with you, I never thought about its being a biscuit. I only thought of it as Shredded Wheat. In describing that biscuit, I would say it was an oblong shredded wheat. I would say the Kellogg's biscuit physically is an oblong shape. It could be termed that. I think it is that. I cannot give any better description than that. I think that description would suit all right.

The way I was served this biscuit in a restaurant, I would say is the customary way of serving a biscuit in a restaurant, in a little package, also of serving other cereals, such as corn flakes and bran. They just bring a carton and let me dump it out myself. They do not dump it out for me.

I came here at the invitation of Mr. D. A. Mays, of the National Biscuit Company, a personal friend of mine. I am not connected in any way with the business. I am in the garment business. I talked with Mr. Mays about the case. I did not talk with Mr. Savage about it. I was willing to sacrifice a few hours of my time through friendship.

RE-DIRECT EXAMINATION.

THE WITNESS: In my travels, I have had Shredded Wheat served to me outside the package, in a restaurant, without the production of the package. That has occurred several times. I could not say whether I was served Kellogg's Whole Wheat Biscuit on those occasions, because I am not well enough acquainted with the product, outside of what I called for. I was served with

a biscuit that seemed like Shredded Wheat, on those occasions, and I used it. It may have been Shredded Wheat or the other product.

Prior to yesterday, I ordered it and thought I was getting what I ordered, although I now know I did not, on every occasion, get Shredded Wheat. In my conversation with Mr. Clarke just now, I used the expression shredded wheat as a name for a product, which I have applied to that product for a long time. He was using it as a descriptive term. That is the reason for his questions and my answers.

MRS. W. A. MAHAFFEY.

Deposition taken at Dallas, Texas, February 15,
1933.

DIRECT EXAMINATION.

THE WITNESS: I keep house for my husband and myself. I am familiar with Shredded Wheat and have been ever since I have been married, about thirty-five years. I have purchased it at stores at different places, and in Fort Worth. I have used it in my home all that time. I recognize Plaintiff's Exhibit 1, which is the package or one similar to the package with which I have been familiar. Shredded Wheat has always been put up in a package something like that.

When I go into a store, I usually ask the salesman for a package of Shredded Wheat Biscuit. Naturally, I have the National Biscuit Shredded Wheat in mind, because I have used that until just the last few years, when I have been given the other, several different times in stores where I trade. I have been accepting the Kellogg product under protest, because we have used and liked the National Shredded Wheat Biscuit, and we knew what it was. When you get used to a thing, you know that thing and like it. When I pro-

tested, the answers have been varied. Some had said it is just as good as the other brand. Some have said it is cheaper. I recently bought a package.

I went into a small store on Evans Avenue, in Fort Worth, and asked for Shredded Wheat Biscuit. He said, "Yes, we have it." He went over and handed me a package. I said, "No, I want the National." He said, "We do not have the National brand, but we carry this, which is just as good and is cheaper." He said, "It has a little cellophane front, so you can see it is exactly the same thing." I said, "I used the other, and I prefer the other," but I was in a hurry, accepted the package, and went along home with it. Plaintiff's Exhibit 184 is the package to which I refer. The box, as I got it, looked like Plaintiff's Exhibit 161. When I bought it, it was filled with biscuit and I could see the biscuit through the window. They looked just like this biscuit on Plaintiff's Exhibit 1. When I saw those biscuit through the window first, they looked similar to Shredded Wheat, of the National Biscuit Company.

It seems to, although I am not definite about it, that I was given Kellogg's biscuit maybe eight or ten years ago. I also had another one given me, but that was neither. It was wheat done in a round biscuit. I believe they call them Muffets. That was offered to me as being as good as Shredded Wheat. I did not receive a package with a window in it as long as ten years ago. Prior to that time, however, the only package I had given to me as Shredded Wheat was the one with the Niagara Falls picture on it. When I say Shredded Wheat, that is the kind of package I mean. If the store has it, I get that in preference to any other biscuit.

CROSS-EXAMINATION.

THE WITNESS: I do not eat either kind very much, myself. My husband is the one who eats the cereals at

our home, mostly. I served him Kellogg's biscuit. He did not think he was getting the same biscuit. He wanted to know why I did not get the other kind of biscuit. He always does that when I get a different kind of biscuit than Shredded Wheat. He always sees the difference right away. He is quite fond of fruit and wheat cereal. He always wants fruits and cereals of some kind for his breakfast. I have, on occasion, served him Kellogg's from time to time. The first time Kellogg's biscuit was handed to me in the store, I recognized right away that it was not the National Biscuit package, because it is in a different box, and a different size.

The National Biscuit Company put out Shredded Wheat like Plaintiff's Exhibit 1, as far as I know. It has a picture of Niagara Falls on it. In other words, it is something we have been consuming and using for many years. I know it is good.

I have known for some years this National brand of Shredded Wheat. I have also known for ~~som~~ years back that there was this Kellogg brand of Shredded Wheat. I would not say that most of the stores with which I deal now carry the Kellogg shredded wheat. Most of them that I deal with do carry the National brand of Shredded Wheat. I do not believe they both carry the same brand at the same time. I was asked to make this purchase of the Kellogg product just the one time; but I have purchased the Kellogg brand before. I shop around at many different stores. I pay cash for my groceries, and I go wherever I want to buy them. I sometimes deal in stores where I help myself. I cannot tell you whether I have seen the Kellogg biscuit in those stores, because I look for the other. When I go into the stores, I have in mind what I want. So I list just what I want to buy. I know how to get around to where each article is kept. If I see it, it is just a matter of seeing it and passing it by. I deal at a few

service stores. I have asked for Shredded Wheat and received Kellogg's biscuit a number of times, at the independent stores. I would ask for National, and they would bring me Kellogg's or some other, did not have the National. I would buy it because I was in a hurry and did not want to go somewhere else to get it. I would use it as a substitute, for the time being; but I would go back and get my National Shredded Wheat when it was convenient to get it. Absolutely every time I got Kellogg's, it was because they did not have the other. When I got Muffetts, the grocer said they were just as good as Shredded Wheat. I think I bought them here in town, at Oak Cliff. I do not eat things like that myself, but my husband ate them. He does not care for anything else like the National Biscuit Shredded Wheat, because he just likes them. They are lighter. My husband has stated that he likes the National the better of the three. He prefers that I get it. I try to get what he wants. I have not very often tried to slip anything over on him by way of substitute. He catches me sometimes. I have never been able to substitute any shredded wheat on him. As a rule, when I get Kellogg's, the grocer tells me they have this brand, and that it is just as good as the other brand. I take it and go on, because I do not want to go somewhere else at that particular time. That is my only reason for taking any substitute.

If I did that often enough, I do not know whether my husband would get to like the Kellogg product. I just said he likes the other better.

PAUL W. SIEBERT.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer. I have been in the grocery line twenty-odd years, and about thirteen years of that for myself. I operate a service store, make deliveries, receive telephone orders, and carry credit accounts. About ninety per cent. of our business is done by telephone.

I recognize Plaintiff's Exhibit No. 1. It is Shredded Wheat. I am familiar with the biscuit in it. I have known about that for twenty-five years. My first experience was with the Reliable Grocery, and that has been at least twenty to twenty-two years ago. I have carried it in stock continuously in all that time. It has never been off the shelf. It is a commodity that sells regularly. There is a demand for it. Customers ask for Shredded Wheat. I presume they know what they want when they ask for Shredded Wheat. They never ask for anything else. I fill the orders with this particular package, Plaintiff's Exhibit 1.

The name shredded wheat has acquired a reputation among the purchasing public. I have hardly ever known anything but Shredded Wheat until some few other brands came out, imitations, you might say, or in competition with it; such as Triscuit and Muffetts, and Kellogg's put out one. They called them Whole Wheat Biscuit or something like that.

I recognize Plaintiff's Exhibit 161. I did carry that; but I discontinued it, because, first, we did not have any sale on it to amount to anything. They had extensive advertising which peeved us a little. It was not exactly in line with our method of selling goods; so we did not try to push it any more. A few customers—two in particular—told me they were selling

Shredded Wheat, and, when they bought two packages, they would give them one. I had to do what I could, taking the package off the shelf and showing the lady that it was not Shredded Wheat.

A lady came and said, "Will you sell me two packages of Shredded Wheat and give me one? They are selling them off the wagon that way." I said, "I am sure it is not Shredded Wheat." She said, "I am sure it is." So she went so far as to look on my shelf and go and look at her package and came back and apologized to me. She was getting Kellogg's and thought she was getting Shredded Wheat. She came to me and asked me to sell her Shredded Wheat at the same price. In fact, she did not buy it that day, because she said she did not know anything about it. She said the man told her that, if she had milk bottles, she would take the milk bottles. A few days later they had a piece in the paper about milk bottles being as good as currency anywhere. We had that feeling, and, of course, we did not then and do not now stock them much, because I do not think we have ever had more than two dozen packages on the shelf. When people ask for Shredded Wheat, there never was, in our mind, anything but the one Shredded Wheat. There was a Whole Wheat Biscuit.

Looking at Plaintiff's Exhibit 161, I now see something about Shredded Wheat on the end of it. I also see the words on the other end. I do not know that I ever took particular notice of that before. I do not think you could ever put out that package for Shredded Wheat. If a customer wanted Shredded Wheat, in my estimation she would want that one Shredded Wheat, because I never knew anything else but the one Shredded Wheat. If it was something else, it would have somebody else's name on, like Kellogg's Whole Wheat Biscuit. They have always had so many items that a customer would not know what they would want. They have caused our service men more trips, because a lady

might want Pep. If she wanted cooked bran, we might send her some other kind of bran. I do not know whether other grocery men are like that or not, but it has always confused us. We usually have one brand of one article. We have more than one kind of corn flakes. We sell very little Kellogg's. I like Post Toasties, myself, and have always pushed it, because they are, in my estimation, a better piece of goods. They do not mush up like other brands.

CROSS-EXAMINATION.

THE WITNESS: I think National Biscuit is the only concern in the country that knows how to make Shredded Wheat. If it would be something on the order of it, it would be somebody else's shredded wheat, or somebody else's Wheat Biscuit. I do not think they could put it out as Shredded Wheat. By Shredded Wheat is meant not only the item that is in it, but the brand of it. In my mind it is not just like oats, whole wheat or hominy. In hominy, you get Quaker Hominy or different kinds of brands of hominy. In grits, you get Quaker Grits, Aunt Jemima Grits, and various others.

If you asked me what Shredded Wheat was, as a physical product, as near as I can describe it, it is a rolled-up biscuit, because, in my early days, it was what it seemed to us, because it looked to me like little shreds coming out of the package, formed into biscuit, and baked. That would be my description of it. I do not think shredded wheat biscuit is a short name for what I have just said, when it comes to the brand or the package. I do not know that that would just exactly mean shredded wheat, shredding it.

If I were asked what a Shredded Whole Wheat Biscuit is, the only thing I would say is that shredded wheat was Shredded Wheat, this one. I have not had any experience with the other one. I do not know what

it would be. I have tasted the Kellogg product. I do not think I saw it when it was called Kellogg's Shredded Whole Wheat biscuit.

If I were told that was a package that had been on the market for some time before Kellogg called it Whole Wheat Biscuit, I would not think they were lying when they said the product in that package was called shredded whole wheat biscuit. I do not think that would be any misrepresentation, to say that that physical product was a shredded whole wheat biscuit. If the product in Plaintiff's Exhibit 161 is shredded, I do not know what shredded would mean. In my estimation, I have always considered it as much a brand as it would be a biscuit.

I think the word shreds has a meaning to a certain extent in the English language. I do not think it means threads or strings. I would have to go and see it scientifically made and see whether it is shredded or not.

Referring to Defendant's Exhibit 1, package of National Shredded Wheat Biscuit, I do not know that I am qualified to say what the word shreds refers to in the phrase: It's All In The Shreds. I do not know that it would have any relation to the biscuit inside, I do not know that we paid that much attention to the package. That phrase does not mean anything in particular to me. I presume there are shreds in this package of shredded wheat. The way it is laid out, for them to call them shreds, it would have to have a definition of what shreds means.

I have heard of shredded coconut. I do not know what it is. I have no idea that that is called shredded. I think they call it grated coconut. If they said grated coconut, I would not expect to find whole coconut instead. I think most of the packages say grated coconut. I would know what that meant. If it said shredded, I think I would classify them both the same. If I had a package of sauerkraut that was marked shredded, I

would expect to find the cabbage torn up into little pieces. I do not mean to imply that the word shredded is any misrepresentation on this package. It is more the brand. It is partly the package, as much as it is what is in it. That is my view of it.

If the wheat grains in Plaintiff's Exhibit 1 were whole wheat grains, and they put the word shredded on the outside, I would not know what they would mean by that. I know what shredded means, as applied to sauerkraut, coconut, and cabbage; but I do not think that applies to this. It really means wheat, shredded; but when a customer comes in and asks me for shredded wheat, that is and has been for years, the only meaning I have had in mind for shredded wheat. Shredded, I suppose, means the same as grated. This might be shredded wheat biscuit, but I do not think it is.

If the Kellogg Company puts on the side of the package this little phrase which I did not notice before, in which it is called a shredded wheat product, I think it is a lie, in this way, because it is not a shredded wheat product, in my opinion; because a shredded wheat product would mean a product from this particular company, in my estimation. Shredded Wheat means a biscuit made by the Shredded Wheat Company. I should think there could be a shredded wheat biscuit made by the Kellogg Company. It would be possible for them to make them. That is Shredded Wheat Company, unless they changed the name on it. That would be a Shredded Wheat product from the Shredded Wheat Company.

Looking at Defendant's Exhibit 5, I think that is a whole wheat biscuit. It comes nearer to this; but I would not consider it a shredded wheat product. I would call it a whole wheat biscuit or shredded whole wheat biscuit. I would have to answer Kellogg's, of course, because it is there, the same as I would say about somebody's grits; but to use the words shredded

whole wheat without Kellogg's would be, to my mind, a product which is neither.

If I had a package of Kellogg's Whole Wheat Biscuit with shredded wheat biscuit in it in my store and somebody asked me for Kellogg's Shredded Wheat, I would not tell them that this was not Shredded Wheat in this package, if they put it on the package that way. If they put it on the package that this is shredded whole wheat, that is true enough for me, as far as that is concerned; because we do not analyze what is in the package, any more than to try them once in a while. The names by which goods go are the large names on the front face of the package. The little stuff on the end is to misrepresent you. For instance, as you buy an automobile for \$675, f. o. b., the \$675 is big and the f. o. b. is small.

I do not know why the Kellogg Company put on the end of the package shredded wheat in its most delicious form. It may be dodging of a certain infringement or skipping over something. I do not know. That is the way I figure the f. o. b. part. The phrase might mean that the Kellogg people had shredded wheat in this package; but ninety-nine out of every hundred would never read that.

We advertise the products in our store very little. We have had circulars once in a while. We have not found them successful of late, so we discontinued them. I have owned the business thirteen or fourteen years. We did not carry Whole Wheat Biscuit until the sampling methods started. I do not believe we had it at that time, because they were selling the product all over town. They had the stuff on trucks. Nobody had consulted us about putting on these exhibits. We feel that, on deals like that, they should come to us. Lipton's Tea people, for instance, will sell them two pounds of coffee and give them one pound; and they will get that stock out of your store and show you a profit. In

the Kellogg instance, we were not consulted. We were peeved because we were getting knocked out of our sale. For that reason, we did not even stock it.

It is customary to buy it from the stock of the neighborhood grocer, so he can make a profit. At that particular time I was peeved, because they did not. We stocked it only twice before that, because the sale was never great enough. I do not turn down business. If they came to us and asked me, I would go out and get it, so the customer would be pleased. If the demand does not come, I will not stock Kellogg's or any other item. If I would get a demand for it, I would put it back in stock. I would just as soon sell one item as another, as long as we can make a profit on it.

As far as my store is concerned, I have never done anything by way of advertising the Kellogg product or explaining it to the customers as a new product. I have never done anything to create a demand for that product. We carry every other item of Kellogg's. This particular item we do not have.

I do recognize the various methods of promotion, telling customers I have a new product, and permitting demonstrators to show them, as legitimate ways of creating a demand for that product. A great many of them ask to put on demonstrations; but we do not encourage it, because we do not have a drop-in trade. Our business is ninety per cent. over the telephone, and there is no reason for demonstrations in our store. Demonstrations are usually held in big stores where there is a big drop-in trade to sample it. I would not have objected to the Kellogg method of sampling if they had bought it at my store. I would have welcomed that means of creating a demand. I would not object to stocking it right now, if there were a demand. I do not think we had a demand for it, even during that sampling. The theory on which others have bought

their samples from me is that it is my territory that is being sold and I ought to have a profit on it.

I handle most of the National line. We ordinarily buy Shredded Wheat through Western States or some other jobber, wherever we can get it cheaper. We also have Brown's cracker line, of which we probably sell more than we do the National, which may be due to prejudice in favor of the home article. We are trying to buy and sell Dallas products.

My orders sometimes go in for Shredded Wheat through the cracker salesman. In fact, they are sometimes somewhat insistent in selling Shredded Wheat with the crackers, to pad their orders. They do not necessarily want me to take Shredded Wheat to get the cracker line. If they give me a price, I would just as soon give it to them as to the other fellow.

Until the National Biscuit bought them up, Shredded Wheat, to me, has always been this Shredded Wheat Company. I was rather surprised to see that they were owned by the National. I was thinking they must have been taken over by the Shredded Wheat Company. But Shredded Wheat was just Shredded Wheat, just like a sack of flour, you know. The National Biscuit salesman is polite in asking for orders. They have a very nice man out there. He has been coming out there a long time. I know he went out of there many a time without my even getting any crackers. I think the records might show I bought Shredded Wheat when I did not buy crackers.

CLARA M. TUTT.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I keep house, cooking for seven. I know Shredded Wheat. I recognize Plaintiff's Exhibit 1, which I have known all my life. We have eaten it as long as I can remember. My mother used it before me. I have always used it in our home.

When I go to a store, I ask for Shredded Wheat. That is all I know. Shredded Wheat, to me, means just a very healthful breakfast package. That is the way I have always considered it. We have always used it, are always partial to it. That is what we think is best for us. We serve it in our home every morning. Sometimes we poach an egg and put it on the biscuit; sometimes we have it with bananas and cream. I do not bring the package on the table. I warm it in the oven before I serve it in a dish on the table.

If I served something different from but similar to that, I am sure my family would know it. We purchase it in a cash service store right close to us. I go there and ask for Shredded Wheat.

Recently, I went into the store of Phipps, on the north side, a store at which I do not regularly trade, and asked for Shredded Wheat. They brought me this package. I was asked to do that by somebody connected with the National Biscuit Company. I said, "This is not the original Shredded Wheat." He said, "Oh, yes, it is." He called a manager and said, "Mr. Phipps, is that the original Shredded Wheat?" He said, "Yes." I said, "This is not what I have been buying." He said, "This is the original Shredded Wheat." I took it and paid for it. This happened yesterday. The box they gave me was Plaintiff's Exhibit 185. I did not even know there was a Kellogg's on the

market, until I saw this package. That is the first time I ever saw it. I never heard of it before. When I look through that little glassine window in the package, I admit it is a good imitation. It certainly looks like Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: It is not as fine a product. I have never tasted it. I just said, "This does not look like the package I have been getting." They said, "No; it is the original Shredded Wheat." I did not believe them, of course, because I know well enough, after I have been using it so long, the Niagara Falls building there. Having seen that Niagara Falls building, you would not doubt in the least you were getting the wrong package. I did not argue with them or try to put them straight. They seemed to be very sincere. I do not know whether they were sincere that the Kellogg package was the original Shredded Wheat. They seemed to believe what they were saying. The man said he would call the boss. He said, "Is this not the original Shredded Wheat?" He said, "Yes."

Mr. Nipp asked me to go to that store. He did not go there with me. He told me just to go to that particular store and to bring him the package. I had never dealt in that store before and had never seen the Kellogg biscuit before. I have asked for Shredded Wheat in other stores. We get it all the time in the store we trade in. My experience with Shredded Wheat has practically been confined to the store where I deal. I do not know whether it carries Kellogg's biscuit. It is the Stop-Six Grocery, on the Dallas pike. I have never eaten Kellogg's biscuit and never had any experience with it until yesterday.

MAXINE REYNOLDS.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am familiar with Plaintiff's Exhibit 1. I know it as Shredded Wheat, and have known it all my life. I use it frequently. I purchase it most of the time, when I go for things myself. I have bought it in restaurants on several occasions. When I ask for it, I ask for Shredded Wheat. I have in mind definitely that I expect to receive Shredded Wheat Biscuit, which is known as Shredded Wheat and is put out by the National Biscuit Company. I have never called it a National Biscuit product; but I have always taken for granted that it was their product, in asking for it. Shredded Wheat means that particular product to me.

"On one occasion, February 1st, I went in the Blackstone Coffee Shop in Fort Worth and ordered Shredded Wheat. When the girl was ready to serve me, she brought out Whole Wheat Biscuit. I told her I had ordered Shredded Wheat. She said, "This is exactly the same thing." She brought the biscuit out in the package, which I saw. I have it. I took the package. That was all the conversation. When she told me that, I went ahead and took it. This is the carton, Plaintiff's Exhibit 186. Before that experience I had never seen or eaten Kellogg's biscuit before. That is the only experience of that kind I had had.

CROSS-EXAMINATION.

THE WITNESS: Mr. Mays, of the National Biscuit Company, asked me to go to this restaurant and order Shredded Wheat. They told me it was exactly the same thing. When I tasted it, I thought they had misinformed me. I knew it was not exactly the same thing. It is a coarser shred, has a tendency to be more doughy

after it is covered with cream. It has a tendency to be thicker and not quite as long as Shredded Wheat Biscuit. In the restaurant, I recognized right away that it was not the National Biscuit Company's product, but it was served to me for it. I did not think it was corn flakes or anything of that sort. I recognized that I was eating a shredded wheat, but a different kind from any I had ever known. That is the first time that happened to me. I have been using Shredded Wheat of the National Biscuit Company twice a week for as long as I can remember. I like it much better than the Kellogg brand. I never paid any attention to Kellogg's, because I always had ordered Shredded Wheat, and this was just recently they had ever given me anything except that, as a substitute.

I do not know anything about any of the other Kellogg products. I suppose I have eaten them, but not to pay any attention to them. I have heard of the Kellogg Company. I have a home. I have had a few food products sampled to my home. It is a relatively common form of merchandising to create an interest in new products.

MRS. R. K. STALCUP.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housekeeper and live in Dallas. I am familiar with the product known as Shredded Wheat and have known it practically all my life, it seems to me. At least eight years. I have never known it by any other name than Shredded Wheat. I purchase it from time to time. I ask for Shredded Wheat, and I expect to get Shredded Wheat.

I recognize Plaintiff's Exhibit 1, which is the package I associate with Shredded Wheat. I have recently,

at the request of a representative of the National Biscuit Company, asked for Shredded Wheat in a store, at the Franklin Grocery, in Fairview Street, Dallas. I went in the store and asked him if he had some Shredded Wheat. He said, "Yes, ma'am, I do have." We both glanced at the same time up to the shelf. He said, "I have the Kellogg's shredded wheat." I said, "Is this the original shredded wheat?" He said, "Yes, ma'am." I said, "I want to be sure. I am buying this for someone else." He said, "Yes, they will never know the difference. This is the original Shredded Wheat." I asked him if he would make me a bill for it. He said he would, and he made out a bill, this one. I paid him and took the package. There was no further conversation. The sales slip, Plaintiff's Exhibit 187, and the package, Plaintiff's Exhibit 188, are the slip and package I received. I think I usually pay nine cents for Shredded Wheat at the Tea Company.

CROSS-EXAMINATION.

THE WITNESS: Neither I nor anybody connected with me has had occasion to deal with the National Biscuit Company. I know Mr. Wilson of that company. He asked me to make this purchase and told me to go to this store, where I had never dealt before. He did not ask me to go to any other store. This man did not look as if he was expecting me when I came in; but he did say that Kellogg's was the original Shredded Wheat. Besides me and the clerk, there was another lady and another man in the store, whom I did not know. They did not hear the conversation I had with the clerk. I did not argue with him or try to put him straight. I just told him I wanted the original Shredded Wheat. It did not occur to me to ask him to put "Original Shredded Wheat" on the bill of sale. I just asked him for a bill of sale. I have heard of Kellogg's biscuit

before. They carry it in our grocery store, where I deal regularly. It has been there for the last few months. They have never offered me Kellogg's biscuit in my own store, A. & P. No. 30, but I have seen them in that store. I have seen the package with the cellophane window like Plaintiff's Exhibit 161. They were on display on the shelves of my A. & P. store. The National Shredded Wheat is on the same shelf, but it was down quite a ways. The package like Plaintiff's Exhibit 161 is very attractive; but I knew the other, and I have always bought the other. I knew what it was. It registered enough on my attention so I knew I had seen this Kellogg's Whole Wheat before the man gave me the package I brought here today. Mr. Wilson kept the package for me until today. He did not go to the store with me. I saw him later. I do not know how far away from my home the store is, but it is some distance. I drove over there in a car. I just went to that one store, following his directions. I have had samples of food products delivered at my door. I do not remember them selling two packages of cereal and giving one free. I have just had samples delivered. That is a method of bringing new food products to my attention as a housewife. I have had a service grocer tell me he had something new and ask me to try it. I have had demonstrations in stores, where the demonstrator tried to get me to try new food products. I do not take advantage of special sales of food products very much. I do not notice or hear that they have specials. I do not shop around. I stay with my own grocery store.

MARY HUNSAKER.

Deposition taken at Kansas City, Missouri, February 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am employed by the Kennedy Grocery Company, in St. Joseph, Missouri, at present. I am not right now connected in any way with the National Biscuit Company. I certainly am familiar with the product known as Shredded Wheat. I have eaten it all my life. I recognize Plaintiff's Exhibit 1. I have known it all my life, as a consumer. My mother has fed it to me. She made me eat it when I was young. Now I want to eat it and still eat it. I live at home with mother and daddy. I do all the buying in my house. I usually purchase Shredded Wheat at Kennedy's, where I work at the present time. I do all my buying at Kennedy's, or at the neighborhood grocery store. Some are service stores, where they wait on me. I always ask for a package or two of Shredded Wheat. Grocers usually know what I mean, and they give me Shredded Wheat, Plaintiff's Exhibit 1.

Shredded Wheat at my home is usually heated in the oven a little, then hot milk over it. Sometimes I just have it heated a little and eat it with butter. We do not bring the package on the table usually. We take the biscuit out of the package.

Prior to this year, I have eaten in restaurants a good deal. I have traveled. It is usually served to me in restaurants in the package, a small, individual package. I ask for Shredded Wheat. Several times I did not get Shredded Wheat, and I would fuss. Once, down at the Rogers store, 234 South Fourth Street, I walked into the store and around to my right. A boy who looked like a senior in high school asked what I wanted. I told him I wanted a package of Shredded Wheat. He walked over to the shelf and took down this package.

I said "I want Shredded Wheat." He said, "This is shredded wheat." I asked him again, "Are you sure this is Shredded Wheat?" He said, "Yes, ma'am, it is." I said, "Will you write it down"—on a piece of paper what I had asked for, because I was getting it for someone else. He said yes, and he wrote on this little piece of paper, "One Shredded Wheat"; and then a very elderly man—his father, I presume—came from behind the living room of the store and asked if I had received what I wanted. The young man said, "Yes, she wanted Shredded Wheat and she has it." I then paid for it and walked out. That was the G. M. Rogers store, 234 South Fourth Street, some time in December. I was asked to make the purchase by someone connected with the National Biscuit Company. The date was the 13th of December. Plaintiff's Exhibit 190 is the box that was given me at that time; and Plaintiff's Exhibit 189 is the slip the young man wrote out for me.

CROSS-EXAMINATION.

THE WITNESS: I made a written statement of the occurrence at the request of someone connected with the National Biscuit Company, which Mr. Clarke may have. I was formerly employed to make several demonstrations for the National Biscuit Company's Wheatsworth, in St. Joseph; but that was all. I have an arrangement where I go to retail stores. I usually have a grill and serve a couple of pancakes to people and sell them Wheatsworth flour, already mixed. I make pancakes out of the flour and try to get them to taste it. They usually do and buy it, and it is wonderful. There was nothing especially unique in that, that I can think of, as compared with the demonstrations usually practiced by other ordinary food demonstrators. Any food that is demonstrated in stores is demonstrated along those broad lines. Demonstrators try to get people to taste it and use it, the purpose being

to introduce the product to new customers or consumers. I find, with Wheatsworth, that there are an astonishing number of people who have never tasted it before. I think housewives are usually very practical and sensible. When you can reach her and get her to taste the product, if she likes it and uses that sort of thing, nine times in ten she will buy it. My experience has almost invariably been that people have, apparently, never tasted it. The Wheatsworth demonstrations have been the most wonderful I have had. We have been doing nothing but demonstrating for four or six months. I have had demonstrations for several other companies.

I am sorry to say I have never demonstrated Shredded Wheat. I never worked for the Kellogg Company at any time. I have been employed during the last three weeks at the Kennedy Grocery Company, St. Joseph. I have two demonstrations a week there. On other days, I just see that everything is running smoothly on the floor. When the young man told his father, "Yes, she wanted Shredded Wheat, and she has got it," I did not say anything, and I did not contradict him. There was no need to argue with him. I wanted them to know I wanted Shredded Wheat; but I did not think it was worth while to argue about it. I took the Shredded Wheat as it was. The elderly man came out and asked whether I had gotten what I wanted, and I said "Yes."

Out on the road I have asked for Shredded Wheat and gotten Kellogg's, several times. I had not known of Kellogg's Whole Wheat Biscuit so very long. I have not the least idea even how long you have had this on the market as a product. I cannot mention the places on the road where I have gotten Kellogg's, because I think I have been in five hundred different places. I could not possibly remember. Of those five hundred, I have asked for Shredded Wheat in a good many. I eat

it once a week or twice a week, for breakfast. I would not just remember. I do not remember the proportion of times I got Shredded Wheat, as compared with the times I got Kellogg's. It did not happen a great many times that I got Kellogg's. I cannot recall the first time. The first time, I knew right away that the Kellogg's Whole Wheat Biscuit was not the Niagara Falls biscuit; because I had been getting it in the little box, and the girl did not bring it that way. She brought it in a plate, and I asked her what it was. She told me it was Kellogg's. I guess I asked her because I am always suspicious of restaurants. I had eaten it for so long, and I was so mad that they did not bring it to me in this little box and that everything was so unsanitary, so unclean. I always hated having it served to me outside the little box, when it could be in it. If the manufacturer is going to the trouble to put that up into a sanitary box or container, the very least the restaurant could do would be to bring it to me in that box, let me pick up the box and turn the biscuit out myself. Previous to that, I had been living on the road for a year; and I was just perfectly sick of the filthy restaurants.

The way they usually do with all dry breakfast foods, such as Grape Nuts, is to bring the box to me and I turn it out myself. The first time Kellogg's biscuit was served to me outside the carton, I asked right away what it was, and the waitress said it was Kellogg's Shredded Wheat. That is the only way I could know it, because I had not started to eat it yet.

Each time I ordered Shredded Wheat and the waitress brought me Kellogg's, I knew that, in the physical sense, I was getting shredded wheat, or thought so; but I wondered why she did not bring it the other way. Physically speaking, it was just as much shredded wheat, being made of wheat and drawn out into shreds.

I have never measured the National and the Kellogg's biscuit, but, according to my eyes, I think they are smaller. I do not know whether it was a difference in their color or size that made me ask about the difference. I was furious. I became a very cross girl on the road, because I was furious about things of that sort. I had not done any demonstrating then. I have never demonstrated until within the last few months. It was not a customer reaction, either; it was just a very critical woman. I was cross about being out on the road. If, after living at home, you go on the road for five years, after being home where everything was the way I wanted it, and then having to go out and live in small and large towns, almost any girl would become very critical. Every time the National Shredded Wheat has been served to me, I am pretty sure it was served in an individual carton containing two biscuit. I may have seen National Shredded Wheat about the size of or a little smaller than Kellogg's Whole Wheat Biscuit, if that was the sample they gave out at the pure food shows. I am of the opinion that there are two sizes of Shredded Wheat Biscuit; one large or regular, and one a little smaller. They would give samples at the pure food shows. I have always gone to the shows, here at St. Joseph. I cannot remember whether I got any or not. Shredded Wheat is Shredded Wheat.

Except for the one time or two when I received Kellogg's product, I have had no discussion with them when they served me Kellogg's. I do not think it was more than two or three times I was troubled that way. In small towns, they have foods around on shelves. If I did not see what I wanted, I got so that I would not ask for it, because I got so cross about it when I did not get it. Since I have been home I have been able to get what I wanted.

I never eat corn flakes, although I know people who do. I never eat any kind of flaked food. I eat Grape Nuts and Shredded Wheat; that is all. I used to eat cooked cereals, but no more.

I do not deal at Rogers Grocery all the time. Mr. Clarence Carolus asked me to go there. He asked me to go, also, to other stores, which I did. Several of them were completely out. I asked them to describe what sort of box they were going to sell me for Shredded Wheat, and they described Kellogg's. Of the others, about eight or ten had Shredded Wheat. I just simply stated I was doing survey work for the National Biscuit. I went to ten stores, I should think. Of those, I actually got the Kellogg product in one store. Three, at least, had the Kellogg product in stock. I asked them if it had a picture of Shredded Wheat and the plant, and they told me no. I said, "Oh, do you mean Kellogg's Whole Wheat Biscuit"; and he said, "No, Kellogg's shredded wheat." That happened in a store on Gayell Boulevard, I believe, and another away down in the Ohio valley, near St. Joseph.

I presume that, out of these ten stores, about five handled Kellogg's and the other five handled National Shredded Wheat. That was a fair survey, as far as I know, of the territory that I operated in at Mr. Carolus' request. That was just practically all. I then became employed and I was eating uptown. I did ask in several places where I ate. Two places were out. Another had been serving Whole Wheat Biscuit, because one of my girl friends had gotten it there. Most of those places served it in a carton, the way I like it, and I did not say any more about it. The only time I eat out now is at noon. I do not eat that sort of food then. I had not eaten Shredded Wheat for two weeks, but tomorrow I am starting in again. I do

love Shredded Wheat; there are so many ways of serving it, with fruit, and so on.

I can only think of three restaurants in St. Joseph and I did not get Kellogg's biscuit in any. It happened, I would say, at least two or three times when I was on the road. I have asked for Shredded Wheat and gotten National Shredded Wheat hundreds of times. I do not remember where I got the Kellogg Biscuit. That is my impression, that that is all. I was on the road five years and ate breakfast every morning. On the road I eat breakfast food more often than at home, because on the road I cannot have the things I want. I was on the road from 1917 until a few months ago. I was in hotel coffee shops, small-town restaurants, very exclusive little places and sometimes just little dumps, from Chicago to Canada and from the coast to Memphis. I have been to every small town in Idaho, Utah, Colorado, Nebraska, Kansas, Missouri, and most of them in Illinois and Indiana. For me to go back and say that, at a certain time and on a certain date, I ate so and so, is impossible. I am testifying from my impression. If it were shown to me by testimony of actual Kellogg men who service the restaurant trade that the Kellogg product has as high as 70 to 80 per cent. distribution in the territories I was in, I would believe it, certainly. I have no fuss with Kellogg's, only I am very mad at them right now, the way they do in St. Joseph. When a customer comes in and asks for Shredded Wheat, and they have not got it but have the Whole Wheat Biscuit, what makes me more angry than anything else is when they say, "You will surely like it. You will not know the difference." That is not what they say. They sell you Whole Wheat and you think you are getting Shredded Wheat. The product made by the National Biscuit Company is Shredded Wheat. I do not mean to say that the Kellogg Company does not

know how to make shredded wheat. I do not mean to say that the National is the only one that can make shredded wheat; it is just like my baking a cake. I mean Shredded Wheat made by the National Biscuit Company. The Kellogg product is not Shredded Wheat; it is Whole Wheat. It is not Shredded Wheat to anyone. I do not assume the grocers were liars when they said it was shredded wheat. They just have a wrong assumption.

If I went in a store and they tried to hand me Grape Nuts or corn flakes, I would say right away, "You are crazy. That is not Shredded Wheat." I wanted to say that when they gave me Kellogg's Shredded Wheat.

XQ. 153. I suppose that all the National Biscuit organization wants to tell everybody that the shredded wheat of the Kellogg Company is not shredded wheat at all.

A. Well, it really is not.

XQ. 154. It is not shredded wheat made by the National Biscuit Company. Is that not what you mean?

A. Yes, on account of the name being patented, and so forth.

MR. VILAS: You are trying to tell Mr. Clarke, are you not, that Shredded Wheat is a trade name?

THE WITNESS: Why, indeed, it is.

MR. VILAS: That is what it means to you, is it?

THE WITNESS: Why it does. It is, is it not?

XQ. 155. In that case, it is marked right here on this package, "Trade-mark Registered U. S. Patent Office, Shredded Wheat." Is that not what you understand it to mean?

A. Yes.

XQ. 156. And that is an absolutely definite statement to you, that that is a trade-mark and it is registered in the patent office, is it not?

A. And there should not be any other Shredded Wheat.

THE WITNESS: There should not have been any other shredded wheat, to my mind. This is what Rogers Store should have said to me: "Madam, we do not have Shredded Wheat. You are asking for Shredded Wheat, but we have not got it. We have something, however, which is just as good: Kellogg's Whole Wheat Biscuit. You can use it in place of Shredded Wheat." But he handed it to me and I said, "Is this Shredded Wheat?" and he said "Yes; it is Shredded Wheat." I say it is not Shredded Wheat. All my life I have gone to the store and bought Shredded Wheat. When I was a little girl and could just say Shredded Wheat, my mother would send me to the store to get it. I went in the store and said I wanted Shredded Wheat. Everybody else wants that, I think, if they have any convictions at all. I am not employed by the National Biscuit Company. I was, just for demonstrations. I had probably three or four demonstrations for Mr. Carolus, one for Mr. Turner, who has the Y Park District, one at the store of Turner and Snow, for Mr. Gibbons, wheatsworth pancake flour, and one out at Jackson Street for Mr. Turner, wheatsworth. I had one at Packer's Market, before it burned, for fig bars. I had one at the Kennedy grocery for fig bars. It seems to me I had one in there for cookies, at some place. Those were all the National demonstrations I had, but not for the National Biscuit Company. I am no employee of that company. I was employed just for the demonstrations, the same as I have been employed by lots of other companies. The National Biscuit Company has not paid me five cents.

The salesmen, instead of putting on those demonstrations themselves, paid me out of their own pockets to put them on. Those were National Biscuit salesmen, but the National Biscuit Company has not paid me five cents. I do not know whether they were paid. I suppose the company paid them their salary. I had nothing to do with that. It has nothing to do with this case. It is a lot of work for a man to fry a lot of pancakes for a hundred or more people and to serve them. These boys hired me just to do that. I just helped them out so they could go on and see their customers and have their regular Saturdays out. I do not know whether the money they paid me was reimbursed to them. I never asked them. Except for these demonstrations, I have never been in the employ of the National Biscuit Company. I have never been in the office, and I do not even know who is in the office, or anything. I have never been to their building. When the grocers told me the Kellogg product was shredded wheat, I would not say they were all wrong. There was never any chance for an argument. I would say the Kellogg product is not, physically speaking, shredded wheat. Shredded Wheat does not mean Kellogg's. It means Shredded Wheat. It is a biscuit, and it is a nice little something. There are not two shredded wheats. That is Kellogg's Whole Wheat Biscuit. It says so right on the box. I can conceive that, when a grocer says there are now two concerns making this little biscuit in pillow-shaped form, it is true; because your wife may make a cake, and so can I; but my cake might be different than hers. I can understand that, when the grocer says "This is shredded wheat," he is talking about the product itself, the little pillow-shaped biscuit. Nevertheless, I think I am right when I say there is only one Shredded Wheat, and that the grocers are indeed wrong when they say there are two kinds. I could not admit the

possibility of my being wrong and their being right about Shredded Wheat. There is only one brand of shredded wheat on the market. Kellogg's biscuit is Whole Wheat Biscuit. If I were asked to tell what whole wheat biscuit was, I would not know.

I would describe the product I see through the cellophane window in that package as a biscuit. It looks very much like shredded wheat biscuit. Why does it not say it is? I have no doubt it is a shredded wheat biscuit. "Whole Wheat Biscuit" would not give me any idea what it was; but, if you said it was shredded whole wheat biscuit, I would immediately think it was shredded wheat, as in Plaintiff's Exhibit 1. Then I would find that, instead of its being Plaintiff's Exhibit 1, it was a Kellogg package.

RE-DIRECT EXAMINATION.

THE WITNESS: The gist of my debate with Mr. Clarke is that I believe that Shredded Wheat is a product name, the name of a product, peculiar to the product I have known so long; and that no one else should call their product by that name. That is only honest and right. The people with whom I associate, when they ask for Shredded Wheat; want Shredded Wheat. If they want Kellogg's, they ask for it.

RE-CROSS-EXAMINATION.

THE WITNESS: I tried to tell you in the beginning that your salesmen should explain the fact that the process is shredded wheat, but that it cannot and should not be called Shredded Wheat. When people ask for Shredded Wheat, you should tell them you do not have the original Shredded Wheat but that this is similar. For instance, if I would go downtown and ask for a dress and find, when I got home, I had a pair of pajamas, it would be the same idea, to me, or if I asked for

Shredded Wheat and found I had gotten some corn flakes. I would be furious. If I asked for Shredded Wheat, meaning one shredded wheat, and a grocer handed me another shredded wheat, I would have the obligation to tell him, "I want the other kind," because that is all I want. I would say, "I want Shredded Wheat." He should then, in my opinion, say: "This is not Shredded Wheat, but it is very similar to Shredded Wheat." If he does not give me oatmeal or corn flakes when I ask for Shredded Wheat, I can conceive the idea that he thinks he is giving me shredded wheat. If I would say, "I do not want that shredded wheat; I want the other kind," there would still be confusion. I have been in Kennedy's store the past few weeks. If a woman came in and asked me for Baker's Cocoa, and I would slip it in a sack and hand it to her; and, after she got home, she found it was Baker's Cocoa when she wanted Hershey's Chocolate, she will not like it. They will come back the next day.

To me, it is the same when I ask for Shredded Wheat. When I go home, I want Shredded Wheat for breakfast. I do not like it if I am going to have Kellogg's. If I said, "I want a package of cocoa," and found, when I got home, that it was chocolate, I could not complain. There is a difference between cocoa and chocolate. There is also a difference between Kellogg's product and the National Shredded Wheat. I think there is as much difference as between cocoa and chocolate.

Some of the Kellogg salesmen do the same thing here in town they do home. They go around on house-to-house canvass, selling a package of Kellogg's and giving a package free. They do not even come to Kennedy's store. If I were Mr. Kennedy, I would throw Kellogg's products out the door.

When I went home one day, mother said, "I wish you would call Mr. Carolus and tell him what happened.

A young man came to the door and wanted me to take a package of something of Kellogg's. He said he would give me a package if I bought one." My mother is certainly very truthful. She said she thought that was terrible, that it spoiled the groceries' trade. My mother did not take the free sample. Her feeling and mine was that it is unfair for the Kellogg Company to be selling stuff from door to door, taking customers away to that extent from the grocers, and trying to get you to buy one package and giving one free. We disapproved of that.

I mean I disapproved of it as a demonstrator or as somebody who is interested in the sale of products. As an ordinary consumer, however, I would be afraid of it, if somebody came to my door with dresses and offered one free if I would buy one. I would be afraid they were shopworn.

It was not my mother's feeling that they were not full-value packages. I did not think it had any bugs in it or anything of that sort. I did not think the Kellogg Company would demonstrate moth-eaten goods to their new customers. My mother thinks it is very unfair to the store. She does not have any professional feeling just because I am temporarily at Kennedy's. My profession is teaching. I just happen to be in this position this year. She is only interested in Kennedy's store because we do a great part of our buying there and we have known them for years and years. So far as worrying about whether Mr. Kennedy will make money or not is concerned, that is not in her mind. In talking to at least six people about the same thing, in St. Joseph, they said it was terrible. If all the packages sold and given away were bought at the stores, out of their regular retail stocks, of the grocers in that neighborhood, I do not know whether that would be unfair to the grocers. They were not advised about it in advance.

Mr. Kennedy did not know anything about it. He said, "What are they doing a thing like that for?"

Mr. Kennedy carries Kellogg's. He has a lighted Kellogg display sign in his window. Ever since I was a little girl, I can remember eating Shredded Wheat. That has all been outraged by the Kellogg Company putting out this Whole Wheat Biscuit. My feeling about Shredded Wheat is certainly outraged by the fact that the Kellogg Company also made a product of shredded wheat. I believe in honest competition.

HENRY F. STEEN.

Deposition taken at Kansas City, Missouri, February 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am vice-president of the United States Air-Ways, carrying mail, express, and passengers by air between Kansas City and Denver. I have occupied that position a little more than two years.

Ever since I left school, I had experience in the food business. When I left school, I went with the National Biscuit Company in Chicago and went to California, then back to Kansas City. In 1926, I think, I left the company and bought an interest in the Piggly-Wiggly Stores here with a man by the name of Byrd. I had been at least twenty-five years with the National Biscuit Company. I left them permanently in 1926, and I have not been associated with them since. This is the first time I have been in here since I left the company. I then bought an interest in the Piggly-Wiggly Stores in Kansas City and became vice-president of that concern. When I went in, we had fifty-six stores; when we sold out to Safeway a few years later, we had two hundred and thirty-one. I had other business connection before I became connected with my present concern.

I recognize Plaintiff's Exhibit 1. I have been familiar with the product known as Shredded Wheat about as long as I can remember. We used Shredded Wheat in our home. Later, we bought a good deal of it and sold a great deal of it, long before it was taken over by the National Biscuit Company, in the Piggly-Wiggly Stores. If the National Biscuit Company took it over in 1929, I had three years' experience buying it, prior to 1929, from the original Shredded Wheat Company at Niagara Falls. Prior to being in the grocery business, I used to use Shredded Wheat, about as long as I can remember. I remember the form of the biscuit during all that time. I cannot remember any difference in it. It seems to me the biscuit has been the same since the first time I saw it. One indelible fact standing out in my mind that I recall is that, when I was a very young boy, I saw them make it in the World's Fair in Chicago. No, I believe they had a plant in the San Francisco Fair in 1914. I guess it was not Chicago. I have a faint recollection of it; but whether it was San Francisco or not I do not know. That was the first time I saw them make it, in a small plant they had set up at the World's Fair at San Francisco. That is the first time I saw it manufactured. Shredded Wheat is the only name I ever knew for it.

I think I know what the general reputation of Shredded Wheat is with the public, from my own experience of it. A few years ago, when I was in the grocery business, there was a little difficulty in getting Shredded Wheat at a certain time. Whether it was lack of production or what, I do not know. This was prior to the National Biscuit Company taking it over. They used to carry a stock in one of the warehouses here. If a car did not get in, there would sometimes be a little lack of delivery.

At one time, we bought some of the Kellogg biscuit and tried to sell it to the customers for Shredded

Wheat, to the consuming public, with no success whatever. They absolutely criticised us for staying with the substitute. We discontinued it, due to the complaints from the consuming public. The public said it wanted the original Shredded Wheat, not something that we wanted to sell them in place of it. They meant they wanted the Shredded Wheat, Niagara Falls Shredded Wheat, the original package that has been on the market as long as they could remember. I would say that it is fair to say, in my opinion, at least, that the term shredded wheat is entirely connected with the Niagara Falls product. I would regard it as a trade name and as the descriptive name of the original Shredded Wheat Biscuit.

I am familiar with Plaintiff's Exhibit 161, the window package. I have seen them. Looking through the window at the contents of the package, I would say it was an imitation of the original Shredded Wheat Biscuit. In my opinion, it is possible for the grocery trade to use that as a substitute for Shredded Wheat, certainly, if you can get away with it.

CROSS-EXAMINATION.

THE WITNESS: Mr. Clarke is a better judge of whether they could get away with it in their sales than I am. The building up of a sound, solid, lasting business on substitution has been done. I do not say it has in Shredded Wheat Biscuit; but there have been other items on the market imitated. We did not have that success. Our own experience was that it could not be done successfully and have satisfied customers. If customers want one particular brand, they might take the other. Such things have been done; but, as my experience has shown, it is not a satisfying package, which might have been due to the fact that Kellogg is substituting it for the old original Shredded Wheat Biscuit.

When we carried Kellogg's shredded wheat, I cannot recall whether I advertised it; but we did in the stores. We operated self-service stores. When you are in the grocery business, you want to sell all the merchandise you possibly can. Usually, with a new product, we would put it on the checking counter where customers check out. A customer would come there, and the clerk would attempt to sell her Kellogg's biscuit. In fact, while we have told them not to substitute, I understand the clerk, when they brought Plaintiff's Exhibit 1 out, would try to take out the package the customer had in the package and substitute Kellogg's package for it. There was a business reason for that. We had a temporary better profit on it. There was a deal on it. Our store managers work on a salary, a thirty per cent. cut in the profits. We got seventy and they got thirty of their own store. We furnished every week a list of long-profit items to the store managers. Naturally, they would go after the items that would give them the greatest profit. I was the first one to buy Kellogg's biscuit over there. The company was a little bit opposed to it; but there was a reason at that time for putting it in. Another chain store in town cut all the profit out of the Niagara Falls package of Shredded Wheat, Plaintiff's Exhibit 1, which at that time was not owned by the National Biscuit Company. We could not make a penny out of it. We used to get twelve cents at that time. I think we paid eleven. They cut it to ten cents a package. We attempted to push the Kellogg product; but we did not continue to do so when we found there was objection to it. So we cut ourselves down to ten cents. We made about eight per cent. on it. It cost eighteen per cent. to run the store. We lost something on it. You are not losing on the actual transaction; but, when you count your overhead, you are losing money. When you are in the grocery business, you are trying to find some way of competing. We attempted

to do it with Kellogg's biscuit. When I say there was a deal on, I mean the manufacturers gave us a special price for a temporary period of time, to introduce it. We never got any deals on Shredded Wheat. I cannot remember any at that time. It was not necessary.

We did, from the National Biscuit Company, go on to other products, any new item. That was customary at that time with any manufacturer. The method was not unique with the Kellogg Company.

When a customer would come to the checking counter with Niagara Falls Shredded Wheat, the clerk would try to exchange the package for Kellogg's package. He would just say, "Here is a package I would like to have you try." I do not remember what else he said. He attempted to substitute Kellogg's package for Plaintiff's Exhibit 1, and he found it was not good business. I had always built up our business on high-quality merchandise without any substitution whatever. We had a splendid reputation here for integrity in a business way, and we did not want any substitution. We were trying to substitute something that was a substitute for the original, and we were afraid there would be a reaction. We thought it was not good merchandising; but it was not unethical, because that is done every day in the grocery business.

Another firm here, Quaker Oats, I believe, had a similar biscuit they called Muffetts. I believe, if Kellogg had used another name than whole wheat, the men could have sold it more conscientiously. If they could have said that here is something known as Muffetts, or something else, not using the term shredded wheat. I believe their success would have been greater, because there are scores of items on the market today which are similar, but which are sold, under different names. Both companies are enjoying a good business. It is not considered an imitation. Muffetts was shredded. They were round, I think. I

would not say that it would be unethical for a clerk to explain what Muffetts were by saying it was a whole wheat, shredded, if that was the fact. It is his business to explain.

It is true that the Kellogg Company has and did have at that time a predominant position in the market on the sale of corn flakes. It is customary to ask what brand you want. If a customer asks for corn flakes, if a clerk is waiting on the trade, he asks, "Which one do you want?" We operated a self-service store. They did not ask for anything.

If a customer came into a service grocery and asked for a package of toasted corn flakes, there being more than one brand handled, if the grocer took his favorite brand and handed it to the customer and the customer took it and walked out, I would not assume she was satisfied until she got home and found out whether it was the kind she was using and whether the quality was satisfactory. If she then kept it and used it, and came back and got more, he could believe she was satisfied, if she did not complain.

Piggly-Wiggly sold the rights to use the name in various parts of the country. You could buy the rights for a state, and all those stores would be considered Piggly-Wiggly Stores. They were all over the United States, but not very much in the east. I believe they predominated the country from Ohio on west. They never invaded the eastern market. They are now opening Piggly-Wiggly stores in Philadelphia, I believe, and in Pittsburgh and other places. I have not been back there recently.

It is true that self-service stores are coming into existence more than the old style of service store and that some service stores are being converted into self-service stores. There are a great many stores going into self-service. It is a growing type of store around the country.

Any new manufacturer of even an old product has a certain amount of resistance to encounter in the demand on any new item, if it is a similar item to what you are already selling and the other item has given perfect satisfaction. There is naturally more sales resistance.

It is true that I would not expect a product like toasted corn flakes to be very long on the market as primary brand, the Kellogg brand, before there would be a secondary brand of corn flakes to compete with it, like Jersey. For instance, for Heinz Ketchup, we would find another competing ketchup on the market made by different manufacturers, and that some grocers would carry the first brand and some would handle the second.

As to Worcestershire sauce, most of those except Lee & Perrin's are sold under different names. It is not the original Lee & Perrin's sauce. I guess practically every brand, generally speaking, has a competitor. It is true that Shredded Wheat was practically a unique article and did not have any competing brands for many years, until the Ross Biscuit came in. Then, later on, came the Kellogg biscuit.

I would not expect the Kellogg Company to meet a great deal of resistance in the trade on the new product. I want to qualify my statement in this way. I did not say anything against the quality of Kellogg's biscuit; but the fact that you were substituting it for a biscuit that has been known for generations as Shredded Wheat Biscuit is where the trade resistance came up. If Kellogg's had used another name--Whole Wheat Biscuit may be the name we have there now; but not at the time I am talking about, when they were selling it as Shredded Wheat. I do not think the name Whole Wheat is the same as Shredded Wheat. What I want to convey to you is the fact that we were substituting biscuit back at that time, which you called

Shredded Wheat Biscuit, for the original Shredded Wheat Biscuit. That is where the objection came from, even from some of our clerks, in addition to the public. In fact, the sales resistance was such that we discontinued it entirely in our stores.

I have too much experience in selling merchandise to say that one cannot create a demand for anything, even though it is an imitation of something else. What I am testifying is that the demand did not exist when I was back in the business, two years before. It has only been two years since I was in the grocery business. In those stores, at that time, there was no large consumer demand for the Kellogg product. We carried it for a while and then discontinued it. We bulletined the Kellogg biscuit to the store manager and gave him his profit on it and tried to sell it. We then decided it was bad business to let him bring it to the attention of the consumer as a whole wheat biscuit, as a substitute for the other.

Physically speaking, I have no doubt the Kellogg Company is able to make a biscuit like the National product. I would not say I think it is any trade secret to manufacture Shredded Wheat.

XQ. 127. My question is this: Suppose that somebody heard that Kellogg was putting out a whole wheat biscuit and never had seen one of them and you had, and this person said, "What kind of biscuit is whole wheat biscuit?" how would you describe it to them? What would you say? Would you simply say that whole wheat biscuit is a whole wheat biscuit?

A. If I were in the grocery business I would say it is an imitation of Shredded Wheat.

THE WITNESS: Just as a man, not a grocer, I would say it was an imitation of Shredded Wheat Biscuit, made at Niagara Falls by the National Biscuit Company. If Kellogg said it is whole wheat biscuit, made out of shreds of whole wheat, just as much

whole wheat shredded as the Niagara Falls product, I would still say it was an imitation. I call the same thing an imitation. I do not use the word imitation as meaning a fake copy of something else. I mean it is an imitation of the original Shredded Wheat Biscuit. That is what I will say; that is what it is. It is nothing else but that.

If I were asked whether Kellogg was manufacturing a shredded whole wheat biscuit, I believe I would say no, that they are just manufacturing an imitation of it. It is nothing else but an imitation of the original Shredded Wheat Biscuit.

The Post Company do not call their Post Toasties corn flakes. They call them Post Toasties. If they have the words corn flakes on their package, I suppose they get away with it. You could probably say they were making toasted corn flakes under another name. The Kellogg Company is not making its shredded wheat biscuit under another name.

It is physically possible for the Kellogg Company to make a biscuit like the one made at Niagara Falls, of different products, anyway. Assuming it is made exactly the same as the other, out of shredded wheat, and the same way, except as to size and color, in the same shape, I believe I would say it was an imitation biscuit. When I say imitation, I mean I think two things can be identical and yet one of them would be an imitation of the other. What I am trying to convey to you is that any item put on the market to be substituted and to use the original name for the package is not fair to the consuming public or to the grocer who is expected to sell it. That is my opinion. It was customary for us to hold meetings once a week, so we could get the reaction of the managers as to what the public thought. When the Kellogg biscuit was put out, we would get complaints from those men. We would ask the question again next week. After a

while, we began to think there was a certain objection to it, and we discontinued the biscuit entirely, went back to Shredded Wheat on an 8 per cent. profit. The matter finally adjusted itself.

After we discontinued the Kellogg biscuit, our competitor raised his price. We discontinued the other biscuit before the competitor changed his price. We just went on, buying them when we saw that they were selling them at ten cents, and we saw they got seven. We attempted to handle this Kellogg product as a competitive product long before the price was put on, not as against the customer but for his preservation. We wanted to make a little profit on our sales, which we were not doing at the time the National Biscuit Company took it over. When the Shredded Wheat Company were advertising the shredded wheat as a loss leader, we were advertising Kellogg against it. That was one reason. There was another. We were handling the Kellogg products. If a man is a good salesman, he will come around and attempt to sell you something, whether you can dispose of it or not. If you were selling the National Biscuit Company products here today and somebody else wanted to get out a new biscuit that might be similar in some respects, although an entirely different name, you naturally would add another item. That is customary in all stores. Any grocer will do that.

If a manufacturer established the name toasted corn flakes, so when people asked for them they meant his product, and other manufacturers then made them and called them toasted corn flakes, I would say they capitalized on the original product. I cannot say that it was an imitation corn-flake. I say that they capitalized on another man's product. They would be, maybe, making toasted corn flakes. There are various kinds of products. The first man making corn flakes is the one who sells it originally. If someone else comes

along and uses that name, he is capitalizing on the other man's past efforts. I would have to see the product to know whether he was making genuine toasted corn flakes. They might possibly be identical in manufacture. That is an imitation of the original. In reality it is true that the Kellogg Company is making an imitation of the original shredded wheat. It is about the same product. It is an imitation, even though it is the same thing, and capitalizing on the other man's name. The first man who put out corn flakes might use a name. If another man came in and used the name, he is capitalizing on the other man's past efforts in building up that business, and he got away with it. I suppose nobody ever interfered with him.

If somebody asked me to describe the National Biscuit Company Shredded Wheat, I would state that it was a biscuit that was made of shredded wheat, properly manufactured, through toasting or baking, or whatever their process is, put into the form of a biscuit, and sold. In my definition, I have said it was made of wheat shredded, which is shredded wheat, that it is made out of whole wheat, and it is made into a pillow-shaped biscuit. If you say, boiling down my description, that it is a shredded whole wheat biscuit, I would say that that is an exact description of this National Biscuit Shredded Wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: The gist of the discussion is that I have known the original Shredded Wheat, the old name, as Shredded Wheat, for many, many years; that it has acquired a reputation with the public, and that the expression Shredded Wheat is attached to the National product in the minds of the public. That is why I say that the Kellogg product is an imitation of it.

Examining Plaintiff's Exhibit 161, I see the cellophane window in front, showing the biscuit. Those biscuit look like Shredded Wheat Biscuit. On the reverse side, I see the picture of two biscuit in a dish. I have seen, quite a little time back, advertising of a carton of the Shredded Wheat Company, which had two biscuit in a dish. Sometimes they also showed strawberries in the dish, like Defendant's Exhibit 6. That was used for many years.

I saw the ends of the Kellogg biscuit carton a little while ago, which says shredded wheat in one way or another, on both ends. Checking all those features of the package to which you have directed my attention, I think that package is designed and can be sold as imitation shredded wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not think it could be sold as genuine shredded wheat, because it is not genuine shredded wheat biscuit. I do not think it could be sold as shredded wheat made out of wood or paper or anything of that sort.

RE-DIRECT EXAMINATION.

THE WITNESS: When Mr. Clarke asks me if it is not genuine shredded wheat, he is using shredded wheat as a common noun. When I use the term shredded wheat, I use it as a trade name. That is the difference between me and Mr. Clarke in the debate we just had. So it is not like two kinds of beans or tomato catsup.

FRED A. TYLER.

Deposition taken at Kansas City, Missouri, February 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, operating my own store in Kansas City. I have been in the grocery business twelve years the first day of this coming April. That is my entire experience with the grocery business. This is a service store. I receive orders on the telephone, which is 75 per cent. of our business.

I recognize the package, Plaintiff's Exhibit 1, as Shredded Wheat. I have been familiar with it since I have been in business and as a consumer before that. We have used it in the home and carry it in our store. Our customers ask for Shredded Wheat when they want that product, and we supply them Shredded Wheat, meaning the product in Plaintiff's Exhibit 1.

The expression shredded wheat has a definite meaning in the minds of my customers. They ask for Shredded Wheat. What I mean by that is that we used to carry Kellogg's Whole Wheat Biscuit. We do not carry it any more, because, when we were out of Shredded Wheat Biscuit, we would substitute it, and we have had some returns of Kellogg's shredded wheat biscuits. When I sent Kellogg's biscuit in answer to a call for Shredded Wheat, it was not always accepted, but it was sometimes and no complaints made about it. I did find it possible to send the Kellogg product, sometimes, in answer to a call for Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: I found that substitution would not work in all cases. When a customer asked for Shredded Wheat, I could not tell from the tone of her voice whether she was using the words with capital

letters or small. If she asked for shredded wheat in a note, spelled with small letters, we have been told to send National Shredded Wheat and not Kellogg's shredded wheat. I do not mean to say at all that I am satisfied that nobody in the United States really wants the Kellogg kind of shredded wheat. I do not know whether they do or not.

It would be impossible for me to say what percentage of customers who asked for shredded wheat and received the Kellogg product returned it to us. I recall an incident where we did have to pick up Kellogg's and send the original Shredded Wheat. There have been some. I do not remember how many. I suppose, if people order Shredded Wheat, that is what they want. When I sent Kellogg's product to those ordering Shredded Wheat, some have sent it back and others have kept it. I do not have any Kellogg's shredded wheat biscuit in stock now. I leave the question of stocking products up to my son, principally. I am outside most of the time and he is inside. I instruct him what to do, of course. We do not intend to carry any line of merchandise that does not move. If I find any non-movers in the store, I put a sale on them, put them down, and sell them regardless. I do not stock Kellogg's biscuit any more. I know we have not had it in the store.

I am president of the Retail Merchants' Association of the State of Missouri and the Retail Grocers' Association of Kansas City, Missouri. I go out and organize associations over the country in different towns. It keeps me pretty busy. All those associations are of large store owners of independently owned stores, opposed to the chain type of doing business; or not opposed. We just want them to be taxed along with us. That is what we are trying to do, to put taxes on the chain organizations. I have just one service store I own, and my son operates it. It re-

ceives a good many telephone orders. We do not exactly have self-service features. We do have displays where the customers can pick for themselves. We have merchandise there, and they come in and pick it up if they want to. We do not have the type of counters they used to have.

I do not recall whether or not we ever tried to create any demand for the Kellogg biscuit by demonstrating, advertising or sampling. It has been some time since we put in Kellogg's. I do not recall just what method we did use. I have not worked in the store very much lately; but every Saturday I was there, and we did a big telephone message business. I got a return myself. That is why I said we had some kick backs on Kellogg's Whole Wheat Biscuit, where they wanted Shredded Wheat. I still take some of those telephone calls, but not so much.

If, every time shredded wheat was ordered, I sent out National Shredded Wheat and about half the customers sent it back and asked for Kellogg's, I guess it would educate me to ask which one they wanted, when they asked for Shredded Wheat; but we have never gone into that. The customers have not gone into it so thoroughly, except on certain occasions. If you were my customer and told me once you did not want Kellogg's but wanted Shredded Wheat, I would recall that incident and would not send Kellogg's to you. Vice versa, I would understand what you meant and would send you Kellogg's even if you said shredded wheat, if that was what you wanted. If you wanted Kellogg's and I had it, I would send it. You would get Shredded Wheat Biscuits if you wanted them and I had them. People get acquainted with an article like Kellogg's or Shredded Wheat after it is on the market a short time, and they tell you what they want. They say "Send me a package of Shredded Wheat." After you have had it in your store, you

know better than to send something else. You would know it would be a mistake. If somebody after that, in ordering the Kellogg product said, "I want shredded wheat," I would know they meant the Kellogg product and I would send it to them. Judging by my experience with substitution, it is not a very successful practice. It is a good way to get myself into arguments and quarrels with my customers if I do not give them what they want. In my own case, I found it was not good practice to use with my customers.

RE-DIRECT EXAMINATION.

THE WITNESS: The condition assumed by Mr. Clarke has never arisen in my store. My customers have not divided themselves, with some of them wanting Shredded Wheat and some of them wanting Kellogg's Whole Wheat Biscuit. Shredded Wheat is the order, from the way I get it. My customers know and ask for Shredded Wheat. When they ask for it, I know what they mean.

RE-CROSS-EXAMINATION.

THE WITNESS: I belong to the Associated Grocers, and they do their own advertising. I do not recall whether they ever advertised Kellogg's Whole Wheat Biscuit or not. It has been a long while since we stepped Kellogg's. I do not recall ever having seen any dealer's advertisement of Kellogg's Whole Wheat Biscuit. If some dealers did advertise it to their trade, that would be, of course, one way of creating demand for that product. Sampling from house to house is a way to create a demand for a product.

If the Kellogg Company advertises to consumers that they have Whole Wheat Biscuit on the market and think it is better than the other biscuit, that would help create demand, advertising by manufacturers,

and by dealers, and sampling from house to house and store demonstrations. That is the way they usually try to create a demand. I never approved of them. I suppose they are legitimate; but I never approved of house-to-house canvassing. I did not think there was anything unlawful about it, but, as a grocer, I would rather not have it done. It takes away the profit you are entitled to. If you take a package of biscuits or any other product to the housewife and give it to her, it takes the profit the merchants are entitled to on that article.

I have had manufacturers buy the sample packages they gave away from me at the regular price. I had them make those propositions; but I always got hooked every time I did it. If both the sold package and the free package were bought from me at the regular retail price, I guess I would feel a little differently about it; but I do not believe in giving free goods to a customer. I fight it all the time. I fight premiums and everything of that kind. I do not believe in that method of merchandising. We have to create a demand in some other way, I believe, than by going out and giving them to the consumer. I do not fight the advertising of that, just the sampling.

I appeared here today to testify at the suggestion of Mr. Neighbor, the sales agent here. He did not ask whether I was handling Kellogg's Biscuit. He was in my store, and he just asked me if I would come down and testify. I do not think he knew I had discontinued handling Kellogg's ~~biscuit~~. He could see whether I had it on my shelf, I guess. I do not handle the entire National Biscuit cracker line, only a very small proportion, because the A. G. organization advertises mostly Loose Wiles. I am mostly a Loose Wiles dealer.

LESTER S. GUTHRIE.

Deposition taken at Kansas City, Missouri, February 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in the farm machinery business at Wichita, Kansas. I am not connected with the National Biscuit Company. I am familiar with the product known as Shredded Wheat and have known it about twenty-five years. I recognize the package, Plaintiff's Exhibit 1, as Shredded Wheat. It is a cereal that my mother always had for me. I never did like bran, and she always gave me that with cream and sugar. I liked it better than I did bran or oatmeal. I have eaten it at home a great many times. Mother usually brought it on the table in the box, opened the box, and take it out. Then she puts it back in the bread box.

I have had occasion to purchase Shredded Wheat. I ask for Shredded Wheat, and I have in mind that I would like to get the Niagara Falls brand of Shredded Wheat; but I often get the Kellogg brand of Whole Wheat, lately.

I remember especially September 7th, in Wichita, at P. O. Weltner's, 3060 East Douglas Street, a grocery store. I bought some other groceries and asked for some Shredded Wheat Biscuit. He gave me a box of Kellogg's Whole Wheat Biscuit. I told him it was not what I wanted. He said, "That is just the same thing. One time they come marked one way; and one time they come marked another." He said it was all one and the same. I told him I did not think they were; but I would take a box home and try them, which I did. Plaintiff's Exhibit 191 is that package. I ate the biscuit. It did not seem to me that it was as firm as Shredded Wheat. It was more porous and open and smaller biscuit.

This first purchase was not made at the request of anybody. Afterwards, I found out, through a friend of mine who is manager of the National Biscuit there. I kidded him why he did not go out and sell old man Weltner some Shredded Wheat, so he would not be fooling the public. I just mentioned this fact to him: that I thought they were selling somebody else's product under the National trade name, and I thought they ought to get down there. They were selling something under the name Shredded Wheat that was not Shredded Wheat. I regard the name Shredded Wheat as a trade name, of course.

I went down there again last night, February fifteenth: I bought a ten-pound sack of sugar, and I told him I wanted a box of Shredded Wheat. He handed me a box of Kellogg's. I called his attention to it. He said, "I have the Niagara brand over here, if you would rather have it, but it costs a cent more a package. It has fewer biscuits in the package. It is all the same thing." I took a box of Shredded Wheat last night; but he offered me the Whole Wheat Biscuits with the conversation I have just related.

I sometimes eat Shredded Wheat in restaurants. I did last night, afterwards. I went down to the Alice Hotel, the Pup Lunch, which is a cafe at the leading hotel there; and I looked down the menu for Shredded Wheat. It was on there. I ordered Shredded Wheat, and they handed me Whole Wheat Biscuits, the Kellogg product in the box right there. So I told the girl to give me another one. She started to tear one of them open, and I told her to give me another one and not to open it. I did not eat either one. I just told her to put them in a sack, that I would take them home with me. She said that is all they had ever sold for Shredded Wheat. I took the menu from that restaurant, and that had Shredded Wheat listed on it. It was there last night. Plaintiff's Exhibit 193 is the menu. I did not eat

Shredded Wheat there. I had already eaten, so I just took doughnuts and coffee. My wife took a regular supper. Plaintiff's Exhibit 192 is the carton the girl did not start to cut open. That was the only time I had that experience in a restaurant. I do not eat in a restaurant very often.

The newspaper I have produced, called the *Wichita Independent*, is delivered to our front porch every week. It is a regular weekly paper, regularly printed in Wichita and distributed to subscribers.

MR. VILAS: I offer particularly the eighth page, carrying the advertisement of T. A. H. Grocers, with particular attention to the advertisement of Shredded Wheat, Kellogg's, twelve biscuit in each package, nine cents.

(The page of the *Wichita Independent* referred to was received in evidence and was marked "Plaintiff's Exhibit 194.")

CROSS-EXAMINATION.

THE WITNESS: I noticed the ad in the *Wichita Independent* after I had bought the package of Kellogg's. I bought it on December 7th the first time. The paper came out after that. My attention as a consumer was attracted to the ad. I noticed it, because I had had that set-to with Mr. Weltner. I felt that he was trying to put something over on me, trying to tell me it was all the same, and I did not think it was. What riled me was that he was trying to give me something else under somebody else's trade name. He did not tell me he was trying to gyp me; but, generally, it was the same thing. He did not use very good judgment, for a business man, because he got kind of hot about it. I did not think that was right, because I tried to convince him he was lying to me. He did not like me to imply he was lying. I do not know what shredded wheat is made of. It

might be made out of glue; but I know I like it. I do not like your Kellogg's Whole Wheat Biscuit as well as I do the other. The Kellogg Company says on there that is made of Whole Wheat Biscuit. He turned it over on the end and showed me where it said "a shredded wheat product." Shredded Wheat is Shredded Wheat. It does not make any difference what it says on the box. When he said it was shredded wheat, I do not think he was sincere in that statement. I said, "Do you know what wheat would look like when it was run through a shredder?" And he did not even know what a shredder was. I do. I sell shredders. I sell farm machinery, to shred wheat, corn, and everything else, as far as that is concerned. He did not know what he was talking about. He said, "I do not even know whether there is any wheat in them or not." He said, "They might not have any wheat in them."

He was trying to sell me something I did not want, because I ordered one thing and he was trying to give me something else. It is not possible that he said shredded wheat in one sense and I meant shredded wheat in another sense. He did not have what I wanted in his store. I wanted Shredded Wheat as in Plaintiff's Exhibit 1. I did not say that to him. I told him I wanted a package of Shredded Wheat. I wanted it that it said Shredded Wheat on the side of the box. He got around to the end of it to try to show me that it did.

I did not understand that he was trying to say it was the same kind of breakfast food as Shredded Wheat Biscuit. He was trying to sell me something I did not want. That was all that conversation. He tried to sell me shredded wheat, but under another name; and I took the strange stuff back with me and said that, if I liked it, I would buy it. I fed it to my dogs. I think it was good for them. I tried some of it myself. I did not, for a fact, like it as much as Shredded Wheat. I have eaten Shredded Wheat practically all my life,

always the Niagara Falls brand. I recognized there was a difference in size between that and the Niagara Falls biscuit. I noticed there was a difference in the looks of it. After I tried it, the dogs were standing there begging, and I said "Come on" and gave it to them. My dogs have begged for National shredded wheat. They beg for everything. There was nothing unique about their conduct. I have some nice dogs.

It is fair to say that, when I asked for shredded wheat, if this man had tried to hand me some toasted corn flakes or oatmeal, I would have said he was crazy, which was the same thing I told him when he handed me this whole wheat biscuit. I told him I wanted Shredded Wheat Biscuit and he was not going to put off some Kellogg's Whole Wheat Biscuit on me. He began to heat up, and he got sort of hostile. I told him I would take them home and try them. I traded there at that store right along. I am not still trading there. I had no break in my friendship with the man over the Kellogg product. Last night, he had some Shredded Wheat and he tried to put off Kellogg's Whole Wheat Biscuit on me under the Shredded Wheat trade name. That is where they are doing wrong. Why do they not advertise Whole Wheat Biscuit and get a name for themselves?

Mr. Ash Paine is the name of my friend in the Shredded Wheat Biscuit Company organization. I went to him and spoke to him about it. I suppose he had called on them before. They worked the town pretty hard. My wife had ordered some from that store before that, and we had bought some Shredded Wheat from Ratcliffe's Grocery. We got some Shredded Wheat last night. His wife tried to sell me Kellogg's. She told me it was the same number of biscuit in the box and it was all the same thing. I took a box of Shredded Wheat and a ten-pound sack of sugar and went home.

RE-DIRECT EXAMINATION.

THE WITNESS: A corn shredder tears corn up and separates the kernels from the cobs, and most generally will blow it off into a loft or a pile. It tears it apart. That is what I understand by shredding. That is what a corn shredder does to corn. I imagine a wheat shredder or oat shredder would do that same thing to wheat or oats.

RE-CROSS-EXAMINATION.

THE WITNESS: If it did not, I would not think it was a shredder. I have not been to Niagara Falls. If I went there and saw the machines that make Shredded Wheat and they were referred to as wheat-shredding machines, I would not think they were shredding machines if they would not shred. They would not be shredding at all. They would be shredding a kernel after it has been—I understand what you mean: something that tears it up as a shredder and cuts it into shreds. By shreds, I assume is meant strings. When you run corn through a shredder, the fodder comes out shredded, and the corn comes out shelled. Speaking of shredded wheat, I think the shredding has reference to shreds. It is all in strings or shreds, as mentioned on Plaintiff's Exhibit 10, "It's All In The Shreds." In my estimation it looks as if they ought to be called strings instead of shreds. It looks like it, if they are going to mix it up with farm machinery. Shredded fodder is where they got the idea. Evidently, the first they made must have run out in a place, and it came out in shreds. The bottom of my pants legs is going to be shredded pretty soon, if things do not change.

My friend Paine was playing bridge at my house. When I spoke to him, he said, "I will have to see about that." That was the comment he made when I razzed him about it. I have known him all my life, practically.

He talks machinery business over with me, and I talk biscuit business over with him.

I left Wichita last night and got here this morning on the sleeper. I think they pull out about one o'clock. I came over here to see Mr. Chadwick of the J. L. Case Machine Company. The National Biscuit Company have not said anything about paying my expenses over here. I imagine they will, though. I would not refuse it if they offered it.

JES C. BRANSON.

Deposition taken at Kansas City, Missouri, February 16, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a salesman in the advertising line, for no one at the present time. I am not a National Biscuit Company man or connected with them. I have a friend with them. I am familiar with a product known as Shredded Wheat and have been for several years. I have known Mr. Watrous, a Shredded Wheat representative, for about ten years. We lived across the street from each other. He is now cereal representative of the National Biscuit Company.

I have been using Shredded Wheat all that time. We used it in my home years before we knew Mr. Watrous. I knew it by the name of Shredded Wheat. We always bought it as Shredded Wheat. The advertising of Shredded Wheat caused us to use it. I think the first I ever used Shredded Wheat was when I was in the grocery business for a number of years in Iowa. I think the first Shredded Wheat I ever used was off my own shelves. I carried it in the store there, and I used it for years, above every other cereal except oats. I had customers come in my store and ask for it. They called it Shredded Wheat. That is the only name I ever knew it by. I never knew anything else by that name.

At the request of Mr. Watrous, some time this month, I went into a store on Troost Avenue, in the Troost Arms Building, a hotel building, in Kansas City, alone. I purchased several articles. I told him I wanted some eggs, Shredded Wheat, and some oranges. He was waiting on three boys. I waited until he had finished with them. I went over and got six oranges and put them on the counter. He asked me what else I wanted. I told him I wanted a package of Shredded Wheat and a half-dozen eggs. He reached over and got the eggs and put them in a bag. He then walked over and brought me a package of Kellogg's and set it down. I told him I wanted a ticket for those articles. As he was going to make out one, I said, "That is not Shredded Wheat." He said, "That is shredded wheat; it is five cents cheaper." I said, "I never saw Shredded Wheat under Kellogg's name." He repeated the statement and said, "Yes, that is shredded wheat, and it costs you five cents less." I picked up the ticket and package and walked out. I identify Plaintiff's Exhibit 195 as the package I bought. Plaintiff's Exhibit 196 is the cash slip on which I paid the bill. He charged me ten cents for the Shredded Wheat. I told him I was getting it for another party and to make me out a ticket. I do not know what I have been paying for Shredded Wheat. My wife does all the purchasing. She usually has Shredded Wheat at home all the time. We occasionally have Triscuit. I do not even know what she pays for oatmeal any more.

My wife serves Shredded Wheat with cream, sometimes with bananas or sliced oranges. She does not bring it to us. The package is always up in the cupboard. If we do not have oatmeal and want Shredded Wheat, we go and get it. I help myself. I always have the habit of serving Shredded Wheat. I just take it and roll it up, and sometimes we heat it. My daughter will eat it if we heat it.

CROSS-EXAMINATION.

THE WITNESS: Mr. Watrous asked me to go to the Troost store. He did not ask me to go to any other. I knew right away when it was put down in front of me, it was not the Niagara Falls Shredded Wheat. I understood the grocer to mean that it cost five cents less than the regular Shredded Wheat Biscuit. I never had anything happen to me anywhere else like this. Mr. Watrous did not tell me to go to any other store but just there and make the purchase.

JAMES F. BELL.

Deposition taken at New York, N. Y., March 24, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am president of General Mills, Inc., milling. I have been in that business about thirty years. General Mills manufacture a general line of cereal products. In the course of my business experience I have had occasion to be connected with the production and sale of cereal products, included among which are some sold under trade name, such as Wheatus, Bisquick, and Gold Medal Flour. Bisquick is one of the proprietary items of General Mills. Gold Medal Flour is a well-known name of one of the products of my company.

I recognize Plaintiff's Exhibit 1 as a product of the National Biscuit Company. I know it by the trade name of Shredded Wheat. I recognize the biscuit taken from the box. My earliest recollection of that biscuit, that I can fix, is 1897. I happened to be in Lawrenceville at school at that time, and it was one of the products served to us for breakfast. It was at that time of the same general appearance it is now.

It was then called by the trade name Shredded Wheat. I have been familiar with that article ever since that time. It has been known by the name of Shredded Wheat. I am not much of a breakfast eater now; but it is used extensively in my home, today, and always has been.

From my experience with the cereal business and my knowledge of the history of this product, I regard the expression Shredded Wheat as a trade-name. It was introduced under the name of Shredded Wheat, and it became known in the minds of the public as a specific product of a specific company. In my opinion, this name is known generally very well to the public as the name of a particular product.

I think the form and appearance of the product, which I have stated remained the same to my knowledge since 1897, have decidedly something to do with the association in the public mind of the name and the product.

I saw the product known as Kellogg's Whole Wheat Biscuit a few weeks ago for the first time. I saw it in a package something like Plaintiff's Exhibit 161. My recollection is not definite as to whether it had a window in it. Looking at the reverse side of the exhibit, that is more like what I saw.

I have seen Shredded Wheat sold in a package like Plaintiff's Exhibit 10, with the picture of a dish on the end of it. I recall that dish. I could not say how long I remember the use of that dish by the Shredded Wheat Company. It was for a considerable period of time, some years.

If I were to see a package like Plaintiff's Exhibit 147, with nothing visible on it except the dish, assuming the product name was covered up, that would suggest to me the Shredded Wheat of the National Biscuit Company or its predecessor company. If I were to

see it with the window package, the window displaying the goods inside, I would make the same answer.

It is the practice among manufacturers of cereals to employ trade names for their products. In my opinion, from my knowledge of the cereal business, I would say that this expression Shredded Wheat is a true trade name. (Question and answer were objected to as incompetent. To be continued against all similar questions.)

Assuming I had knowledge that it was a wheat product, if a Shredded Wheat Biscuit were put under my eyes, without any knowledge beforehand, I would say it was a drawn product of wheat, or a vermicelli-formed product of wheat; and that, as a descriptive name, Shredded Wheat was a poor choice, I would say. If the original people wanted to use the words Shredded Wheat as a descriptive term, I think they picked a poor descriptive term. I would never describe it in that way. If it were put in front of me without my previous knowledge of it, I would never say it was a shredded product.

Referring again to Plaintiff's Exhibit 147, examining the front end of the package and seeing the words A shredded wheat product, I would make the same comment I made before: that I would say that Shredded Wheat meant a product of the National Biscuit Company or its predecessor company, I would not call it descriptive, any more than I would in the sense that I would not describe the product as a Shredded Wheat product. I have never seen this product in any other form than this pillow-shaped biscuit.

It has been suggested to me to make it in another form. I was approached, some years ago, to engage in a wheat product of this character; but the form in which it was shown was round. It was a man from Chicago. His name might have been Williams. He

came to us some years ago and endeavored to interest us in the manufacture of the product. He showed us this globular or semi-globular formed biscuit.

I know no other biscuit made of similar materials on the market today. Triscuit, as I recall it, is a flat, cracker-like product. It is made, however, by the National Biscuit Company, of the same material of which Shredded Wheat is made. Triscuit is a trade name and a fanciful name.

CROSS-EXAMINATION.

THE WITNESS: I do not think corn flakes has been held to be a trade name. Corn flakes or wheat flakes or anything of that sort is the result of a flaking process. As far as I know, it can only be made in that way, in that form, mechanically. For that reason, I would not call corn flakes a trade name, in the sense in which I have called shredded wheat a trade name.

If these machines were known as shredding machines, that would make no difference to me. My idea of a shredding machine is one that tears things up, rips them to pieces. My idea of a shred physically is small fragments of original material torn apart.

Noting the phrase on the bottom of Defendant's Exhibit 81, "It's All In The Shreds," that would not mean anything to me personally. It would not mean anything on that box. What is in the shreds? As you show it to me, that phrase conveys nothing to me. The words Shredded Wheat on that package identify it as the proprietary product. I take the word shredded to mean things torn into fine pieces. As a noun, the word shred would mean one of the particles that resulted from shredding. It would not be a flake. It is the form into which a thing is ripped into shreds.

I have heard of shredded codfish. The word shredded there means a thing torn to pieces. I would

think it was codfish torn into shreds. I cannot imagine wheat in shreds. You would take the wheat and put it through a machine with a lot of knives that tear and rip it, and the wheat would be shredded, yes. I think, if the term Shredded Wheat was meant to describe the product of wheat, it was but a very poor choice. If it was put out as a trade name and the public accepted it as such, it being a wheat product, what difference would the form particularly make? I have a good deal of respect for the opinions of courts.

If I were told the Shredded Wheat Company tried to register this product as Shredded Wheat under a trade-mark, under the Act of 1905, which is the act under which a fanciful or non-descriptive trade-mark is registered; that the Patent Department refused to so register it; and that they went all the way to the Court of Appeals of the District of Columbia and failed to secure such registration, that would not affect my opinion. I would not want to answer a question like that unless I had read all that testimony; but I do not think it would be persuasive. I would not call vermicelli or macaroni or spaghetti shreds. I never heard of shredded cabbage. I would not call sauerkraut in shredded form a shredded product; I would call it sliced. Seeing a piece of cabbage, not knowing whether it had been sliced or squeezed through a hole, the word shredded might not be wildly mis-descriptive of that product; but I would say it was a sliver of lettuce or slice of lettuce or slice of cabbage. You see, I am familiar with the making of sauerkraut.

I am not connected with any other organization besides General Mills. That is a substantial business. I have no connection with the Red Owl organization at all. I am a stockholder in the Red Owl, but I have no connection with it. I am neither an officer nor a director nor anything else. I am a stockholder in it. It is a chain organization. I am a stockholder in

quite a number of chain organizations. I own quite a number of shares in the Red Owl. I think maybe you are getting me mixed with my son, who bears the same name. I believe he is secretary and treasurer of the Red Owl. I think he is. I know he was an officer. Whether he has been changed into some other position or what the exact situation is, I do not know. He very seldom discusses that subject with me.

The Red Owl chain stores are in the middle northwest section of the country. I do not know that they are quite good customers of the Kellogg Company. I do not know anything about their policies.

I would not know whether they stock a product before there is a demand for it. I suppose their object is to perform services to their customers and give them what they call for. That is what we all have to do. I did not know that that chain are very large users of Kellogg's Whole Wheat Biscuit. I would not have the slightest feeling in the matter if you tell it to me. I have no objection if any of your dividends come in part from earnings on Kellogg's Whole Wheat Biscuit. It is not for me to question that. That is their business, not mine.

Noting again the name Whole Wheat Biscuit, as it is placed on Kellogg's package, since you say it is made out of whole wheat, I would not say that that was a trade name. I have seen the Kellogg biscuit. I would say it was an imitation of Shredded Wheat. Since my testimony stated that I thought Shredded Wheat was a product of the National Biscuit Company or its predecessor company, I could not, unless you told me who made the product, say it was not an imitation. My definition of shredded wheat is a biscuit of that kind made by the National Biscuit Company or the old company. I have already testified what I consider in respect to shredded wheat. I would say shredded wheat is a pillow-shaped vermicelli-

formed wheat product. I would not say it was a shredded whole wheat biscuit. I would say that, if it was a shredded wheat biscuit, it would either be made by the National Biscuit Company or its predecessor company, or it would be an imitation. If it were genuine whole wheat biscuit put through a shredding machine, I would not say it was a shredded wheat biscuit. Shredded wheat, as I have already testified, is a product of the National Biscuit Company or its predecessors. I identified that in three ways: as a name, a product, and a shape. Apparently, they have erected in the minds of the public this product in the most desirable ways of coverage that I can conceive of, being in the cereal business; because they have a three-way coverage, as far as the public mind is concerned: name, product and form. No one else has any right, in my opinion, to use either the name or the shape. I think those rights would be exclusive. They have promoted all those three phases over a long period of time; and they have so identified them in the public mind that I think it would not be fair if they did not have proper protection in all three of them. By that I mean the complete exclusion of anyone else, in the name, shape, or form of the biscuit. That would not be a complete monopoly, in my opinion. As long as the patents have run out, if you made other products of wheat, assuming the right existed in the expiration of the patents to use this vermicelli form of product, it could be put into other shapes.

I did not know the shape itself was the subject of a design patent. I am not familiar with the patents on it at all. I am really just basing my testimony on my opinions at the present time. I do not know anything about the history of the business. Of course, I am basing my testimony as well on my experience in the business.

I do not know that the Shredded Wheat product was the subject of litigation with the Ross Biscuit Company, and that the courts held the Ross Company had the right to make the identical biscuit in that identical form. I did not know that the courts had ruled on the trade name Shredded Wheat. I only know it from the trade standpoint. The trade know that shaped biscuit.

If no one else used the words Whole Wheat or Whole Wheat Biscuit for such a period of years that a customer saying, "I want Whole Wheat Biscuit," would immediately mean Kellogg's Whole Wheat Biscuit to the public mind, I would call that the trade name of it if they had come out and firmly fixed it into the minds of a public over a period of time. In that event, one would think they were entitled to it. Our experience has been, however, that they will not, because it is Whole Wheat, and, therefore, thoroughly descriptive. Our own experiences have been, as you might say, along another line. We thought we had certain things covered and they were not covered. Here is a product of which all three features have been covered from a very good standpoint, as far as the trade is concerned. My mind is definitely fixed that the National Biscuit Company would have the exclusive right to the name and the form of its biscuit. So far as making Whole Wheat Biscuits is concerned, of course they would not have it or Whole Wheat products covered. That product, however, I know as Shredded Wheat Biscuit, I assume no one has any right to make except the National Biscuit Company.

As I said before, the flake is the natural result of a flaking process; but I do not think that Shredded Wheat, in the form of the National Biscuit Company product, would be the natural result of a shredding process. I think you could use shredding machines, and, whatever those machines produced, you would

call them vermicelli or tubular, or string-like, spun or drawn results. It is rather a drawn or spun product. I might call them filaments, but I would not call them shreds. I would be very much surprised if, through all the early patents on those products, they were called filaments or shreds. If, in some of the patents and trade-marks, the product of those machines was referred to as shredded wheat, I would be surprised that they called it a shred. I would not call it a shred. It would not mean that to me.

Shreds, as described there, would not represent such a product as the National Biscuit Company product. I would call the Kellogg product an imitation of Shredded Wheat. I would not say that, in the generic sense, it was shredded. When I say imitation, I mean something that looks like something else, but is not really the same thing. I think it is physically an impossibility for the Kellogg Company to reproduce the thing that the National Biscuit Company are making, leaving legal and trade-mark considerations out of the question. As a physical fact, they have made it, and it is an imitation of the original product. This Kellogg product, as it stands, is an imitation of Shredded Wheat. It looks exactly the same as the National Biscuit product. You tell me it is made from wheat, and I assume all the wheat is in it. It is a vermicelli-formed product. I would describe the other product as a vermicelli-formed product. I will assume that Kellogg can turn out a product that looks exactly like the product turned out by the National Biscuit Company. Unless you put them in front of me, alongside each other, I could not tell which was the real one and which the imitation. Unless you told me both were made by the National Biscuit Company, I could not tell you which was Shredded Wheat and which was the imitation.

If you made up a papier-mache car that looked like a Cadillac, I would not call it an imitation Cadillac. If

it was a copy, I would say it was a papier-mache replica of an automobile. It is not an automobile. It does not operate. I think you would have to use the word imitation in a wholly different sense here. I might say that you could make an automobile which looked like a Cadillac and was made to deceive the eye of the observer into thinking it actually was a Cadillac. If you made a papier-mache replica of a Cadillac, he would not say it was an automobile.

I would say that the Kellogg Company is a thoroughly responsible concern. I never examined into its affairs; but I think we can accept it, in the general sense, as a large and responsible company. Referring to Kellogg's Shredded Whole Wheat Biscuit, Plaintiff's Exhibit 165, if Kellogg put a product on the market represented in that way, the matter of whether it was misrepresenting that product, physically, would be for the courts to decide; but, if they put out a shredded whole wheat, even though they made it to resemble shredded biscuit, I would say it was another product. I would say that this term, Shredded Whole Wheat is, in my opinion, deceptive. It would be deceptive; and they would be practicing a deception on the public by telling them they were giving them Shredded Wheat Biscuit when they were not. It is quite a matter for them if they want to make it read Kellogg's vermicelli whole wheat. It is a drawn product or spun product of wheat. They could call it anything they wanted to except shredded. I would think that shredded, originally, had the sense of something being torn, rather than squeezed into a strip. Even if the trade and the public by universal usage had decided it was shredded, what they do decide would not change the psychology of the people or the acceptance of the public with respect to it.

I have not seen Rippled Wheat. That is a new one. Looking at Defendant's Exhibit 88, that is quite differ-

ent. It has not as much vermicelli form to it as the other. It looks more like Muffetts, a product made in a ribbon and wound around. They tried to sell that to us. The fine spaghetti of the market known as vermicelli is a very fine, thread-like thing that you can spin, undoubtedly. It is just like a string or thread. It is done with wheat. Vermicelli is formed from wheat. I have not heard the term vermicelli-form used in connection with wheat processes. I have only used it in my mind for some descriptive term. Let us say a wire or a thread. A thread we conceive of as being actually spun and a wire is drawn.

If it is a fact that, all through the patents for making Shredded Wheat Biscuit, those machines are known as shredding machines, that would not have any meaning to me. It would not affect the term. I regard that seriously as a misconception of those machines. What does a jig mean in machinery? It has now a very definite meaning to me; but, if I were without any knowledge of it and it were put before me, I would not call it a jig; I would say it was a guide. Shredding machines, as I have seen shredding machines, have been a series of knives that tore the product up. I have never seen Shredded Wheat made; but shredding machines would be machines with knives that ripped and tore. Rippled Wheat cannot be made the same as Shredded Wheat. It does not look drawn, if you would take it as you would draw a wire out.

I was down here at this time on the Farm Board Bill and happened to be in the city. The National Biscuit Company interviewed me in Minneapolis at my home. They had arranged to take my testimony there. I happened to call them up when I was East and said I was here in the city, if they wanted to examine me. I was East on account of the Agricultural Bill.

I would not attempt to read the minds of these people; and I would not attempt to say what my own

mind would be if I were faced with that same situation. I do not know how to answer that. I think Shredded Wheat was a very poor choice, if they wanted to use a descriptive name. The originators of this may have thought it was a descriptive name, although it does not seem descriptive to me. At any rate, they had it in the minds of the people, the name, the product, and the form. To my mind, they had an ideal situation, which any cereal manufacturer would like to aspire to when he puts out a product. I think decidedly that they could have gotten a much better term to describe their product. If they wanted a descriptive name, it was a poor choice. I will not go so far as to say the words shredded wheat are actually misdescriptive or deceptive; but I think they have gotten an acceptance of it into the public mind in connection with that product in that form.

RE-DIRECT EXAMINATION.

THE WITNESS: If the originator of this product had wanted to pick out a fancy name for it, I would not criticize his choice in the slightest. If he liked Shredded Wheat, or Rippled Wheat, or Spun Wheat, or anything else like that and wanted to use it, it was up to him. He could have called it anything he liked in a fanciful way, a bird's nest, or anything.

Having had my attention directed to the description of the product by the originator of it, in his Letters Patent 548086, October 15, 1895: "A food or bread, composed of superposed or massed layers or deposits of dry, externally rough, porous, sinuous threads or filaments of cooked whole wheat," I would say that was a description of this product, shredded whole wheat—threads, or filaments, or wire; anything except shreds. It would not mean shreds to me. I cannot tell what was behind the interpretation of the phrase, "It's all In the Shreds."

My trip East was in connection with the Farm Board Emergency Bill, so called. I did not come here at the request of the Biscuit Company to testify here in New York. It happened to suit my convenience and yours. I am cooling my heels around here, waiting for this Congress to take action. I am awaiting action that is to take place today.

Vermicelli is a wheat product, made of hard Durum Wheat, and from other hard wheats.

The Shredded Wheat Company has extensively advertised its product under this name and shape. In view of my knowledge of the extensive advertising of the Shredded Wheat Company, I would say that, in my opinion, Kellogg's Whole Wheat Biscuit, such as I have before me, could be introduced to the public more readily by reason of that. I would say the Kellogg Company was getting out the same kind of product the National Biscuit Company are; that is to say, an imitation of it.

I would not think it was strange if I were told that a witness testified that, in talking to a dealer, he was told he was under the impression the Kellogg Company owned the Shredded Wheat Company. That might easily be possible. There might be a hundred other interpretations.

RE-CROSS-EXAMINATION.

*THE WITNESS: As to whether the Kellogg Company has done anything wilfully to create that impression, there is the product itself. It speaks for itself. I do not think the Kellogg Company would have put out a product of this kind or would have had it suggested to them, had the other product not been on the market. As to whether the packages could be taken one for the other, I do not know how well people look at it. They have been familiar with the product and have known it for a long time.

If I went into a store and asked for a package of shredded wheat, I would expect to get the National Biscuit Company's product. If they sent me something else, then I would have said there was an opportunity to substitute for what I had desired. If I looked at the bottom of the Kellogg package carelessly, I could readily be deceived into thinking it was a Shredded Wheat package. If I examined it and saw Kellogg's on it, I would say Kellogg was making an imitation of Shredded Wheat. Am I going to get the same thing or not? I do not know, except by trial. It looks the same.

I would not say that the man who designed the Kellogg package was trying to imitate the other. I have seen the Kellogg biscuit. I was shown one outside the carton. I can see from the depth of the cartons that there is quite a difference in the length of the biscuit, if you see it this way. As they set on the shelves, you would not see that. If you went in the store and saw them as they are set on the shelves, you would not know how deep it was. I would very quickly, however, find that out when I took them out of the package and put them in the plate. If I went in the store and asked for Kellogg's Whole Wheat Biscuit or for Whole Wheat Biscuit, I do not know which product I would expect to get. I do not know about trade conditions. I do not know how far you have gone in your advertising of Whole Wheat Biscuit in this form. If I went in and asked for Whole Wheat Biscuit and did not specify some particular one, I might get Triscuit. I might get any one in the category of whole wheat biscuit, because there are biscuits and biscuits, as we know; and any biscuit that was made of whole wheat would answer the order.

I hope my son is not an unfair merchandiser. I am not familiar with that organization's affairs. I do not know what kind of reputation they have among manufacturers. I hope it is a good one. I preach the

general principles of being fair to all; but how far it sinks into the youthful mind and how hard-boiled they are, I could not tell you. I think General Mills is a direct competitor of the Kellogg Company. I think we were in the wheat flake line before you were. In that sense, we are. Otherwise, I have no particular feeling, one way or the other. I have no personal friends in the National Biscuit Company. I have known some people a long time, as I know other people in the trade.

RICHARD H. MALONE.

Deposition taken at Denver, Colorado, April 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have been in Denver since sixty years ago the first day of last February, at two-thirty in the morning. I will be seventy-six on the twenty-third day of March. I am a realtor. I am taking care of the hotel and some other property I have.

During the 1890's, I was a partner of F. W. Crocker, at the cracker factory, on Nineteenth and Blake, which is still in existence. We sold it out in May, 1890, to the American Biscuit Manufacturing Company, and then they afterwards consolidated. So the factory to which I refer is still in existence as one of the National Biscuit Company's factories.

At that time, the factory was equipped with the usual cracker-baking machinery. I came here in 1876, and it was equipped then. It had three Reel Ovens.

I recognize the document shown me, Plaintiff's Exhibit 234 for identification, in which we agreed to consolidate with the biscuit folks on the Missouri River and out this way. That is Mr. Crocker's signature, my signature, and my typewriting. It is dated May 19, 1890, and has reference to the selling out, to which referred in my testimony.

The F. W. Crocker named therein was my brother-in-law, and at that time my partner. I met a man named Henry D. Perky. I have seen him a good many times. It was between 1888 and 1892 or 1893, I think. I met him many times. He was interested in the Circle Railroad here, which the Santa Fe afterwards had. My brother was interesting in trying to promote it. My recollection is that it came along in 1888 or 1889, when I first met him. He was interested in the railroad I speak of during those years. I met him in connection, also, with the manufacture of shredded wheat. I have been thinking about it, and I would say it was 1889, but it might not have been until after 1890. I will tell you why I remember it. My partner, Mr. Crocker, went to Europe. I had a stenographer, because I did not know how to spell to write him, so she was there along in those years. I did not have much to do with Perky. Harry James was interested with him and Milo Smith, a man who had an addition out here, and they came in and asked me about backing them. They said Perky had only baked them in the kitchen stove, by hand. He asked me if I would take them over and bake them in the plant. They were then located in what was then called Market Street, the third store from Eighteenth, going toward Nineteenth. That is when I first had anything to do with this shredded biscuit. They did not have much of any plant. They did not have much money. Harry James, whom we all loved, was financing it. He called me over and showed it to me. It was a machine run by hand, as I remember. It ran in rows, with a little space between each one. I said I would cook it for him. We talked it over, and they went to my factory to see what we could do. We had high racks that we put pans in between. I told them we could fix it over here or they could bring it over and we would cook it for them. We sent the racks over to them. The foreman and I built a fire and heated the oven. We

asked them what heat they wanted. They did not know anything. We tried out one or two of them. Then, we ran about four of those racks full. They baked them and took them off.

I said, "What are you going to do with them?" Perky said, "I am going to sell them." I said, "Harry James, don't I ever get one for cooking them?" So they gave me a little pop box full and I took it up to the house to see if my folks wanted to eat it.

What makes me remember those things is that Crocker was in Europe then, also the fact that we sold out to the National Biscuit Company in 1890, Mr. Crocker and I. After we sold out, the question came up whether I had a right to bake. I did not give a darn if I did not. I baked it for nothing, because I did not care. So it must have been about that time; because I would probably have disobeyed the order, if some friend has asked me to bake some for him. I figured it was in those days. I do not remember my partner being there at the time; but I do remember seeing the biscuit there in the row, after being sort of spread out. They were cut off, just about the same length that you are running them.

I recognize a biscuit out of Plaintiff's Exhibit 1. I think the biscuit at that time were perfect in that way. I do not think it has ever been changed. Perky called them shredded wheat biscuit, and I asked him what he was going to do with the ones I baked for him. He said he was going to sell them. I baked them on two occasions.

My stenographer at that time was Mrs. A. M. Nickerson. She is living here in town now, working at the State Capitol. She was with me nine years. Harry James and Milo Smith were interested. Harry said, "Dick, do you want to go in with it? Do you think it is a profitable thing?" I said, "I will put in some money with you"; but I did not. I never saw Perky after

that. The last time I cooked it was the last time I saw him. He never came near enough to give me an opportunity. I do not remember anything about where they baked them after that. He may have come down once or twice. I do not remember. They told me they had been baking them in their kitchen stove.

Another means I have of fixing the time is that my son was born in 1887. He was very sick for three or four years and I had my teamster's wife go over to the house to take care of him and my wife. The name of the teamster who was working for me at that time was Washington Sturns.

CROSS-EXAMINATION.

THE WITNESS: I stayed with the factory after it was sold to the American Biscuit Manufacturing Company, until they went in with the National Biscuit Company, eight years. I was manager. It would have been physically possible for me to have baked this biscuit just as well after the sale as before. The ovens were all there. I am quite certain this biscuit was baked after Mr. James became interested; because I would not have done it for anybody but James.

I know Mr. Harry Lindsley, after he got into politics. I do not know that Mr. Lindsley was solicited to become interested, and refused but got his partner, James, to go into it. I never heard him mentioned in my life on that subject. If he stated that, after he turned it down, about 1893, Mr. James took an interest in it, I doubt him. I do not think his statement is correct. I do not know anything about it. I never knew before this week that Lindsley had anything to do with it. I would doubt the statement because I have known him in politics for years. I have fought with him and worked with him. You can draw your own conclusions. I would not believe all of it. I will tell Harry that this afternoon when I see him. There is no question that

James did take an interest in it, because James asked me to cook it for him. James died a year or two ago. There is no question that whatever I did was after James was interested, because he came over and told me about it. They had kind of a little hand machine that you might call a sort of coffee grinder, if you wanted to. My recollection is that it had a handle. It was on a small table of some kind. I recall how the wheat came out of that machine. It started up here. They put the wet wheat in the hopper. I think they said they had steamed it. At any rate, I ate some of it. It ran out in a row, something like that, and then there was, as I remember it, a little space between them so they would not touch each other. I do not mean each string or shred was separate. Each one of those shreds was strung out. They were all so close together that they made a unit something like that biscuit Mr. Vilas has.

Those I cooked were not piled up on top of each other. They ran like across, right across there, we will say, and then put on to my iron pans, about two and a half feet wide. I have forgotten just what length those iron pans were that we had. At any rate, those threads in there were about two and a half feet in length as they were baked in the pans. If that iron pan is not that wide, you know, it would not be. The shreds were as long as the pan. I think the pans were approximately two and a half feet long. That is the way they were cooked. My recollection is that there were three or four of those long shreds, run close together. Then here would be another and here another. Then they would run those out and cut them off and then run some more. There would always be a little crease between those layers of wheat, showing there was a division on the machine. I have drawn on this piece of paper four long shreds. There would not be four more shreds come on top of them, that I know of, so as to leave

space's between them. I never saw them on top of each other. I should say they were about half an inch thick, each of the threads that went out, about half an inch thick. That is a continuous thread, and those ran big enough so that they ran together. When one would come out, it would be right close to the next one, and so on, right all the way through. They came out the whole three or four threads at one time. They were noticeably apart from each other. I described each one as about half an inch in thickness. I cannot be sure about that. As far as I can remember, they were about like that one there when they came out of the machine. When the wet wheat was in here, it was not more than half an inch square. When you cooked them, they swelled up. Each one of these threads in here was half an inch thick, about. There were four of them right close together. When we cooked them, they were together just like Plaintiff's Exhibit 1, ribbon-shaped threads, right close to each other, right next to each other. I never cut any or saw any cut in cross-section. There were three or four of them as we have drawn it here, as I remember. None of them were lying on top of each other. They ran together before we even touched them. When they came out, the wet ones would be so close together that they would stick together.

(Mr. Clarke's sketch was marked "Defendant's Exhibit 106.")

Making my own drawing, now, this is the way they were when they came out on the pan, on Defendant's Exhibit 107, but there was a decrease, an impression between each of those. It was not a space. They were already closed when they ran out. But it was a depression. They would run in this way, and then those would all come through with a depression in there like that. They were stuck together and you could pull them apart on those lines. I do not remember about that slight

depression, only as it was out in a row. By the time we got them over from their place, which was about a block and a half from where they made them to where we baked them, they were all one. They went into a solid mass or sheet, with no layers or layers, whatsoever.

It was not like is shown in perspective on the sketch you now show me, because the ridges between them showed on top. They called this product Shredded Whole Wheat Biscuit at that time. I did not pay much attention to the machine. It was the finished product I was interested in. I did not know Mr. Perky very well at that time. I do not know anything about his work in Denver in connection with the Circle Railway, any more than if he went away and never came back. I did not say Lindsley was a liar. I doubt some statements of almost every politician. I see no reason why Perky should not go away from here after the Circle Railway time and go down to Texas. I will not make any expression of opinion, one way or the other. It is a matter of indifference to me, what he is and what he does. We are good friends yet. We have been working in politics lately. We were both in politics lately. I do not believe he would say as much about me as I have about him. I do not think he would have any right to, and I would call him a liar if he did. I will fight with him if he wants it. He has no cause of complaint of me.

I think I saw the little machines work, but I do not remember much about that. I was only on the baking part. I am sure I saw a little machine; but I knew nothing about it or about any of the machines that made them. My impression was that it was a little hand machine, operated by a crank. My recollection is that the only bakings I did were the two I have described. Those pans were about that long, and there would be about twenty-eight or twenty-four of those wide, as I remember. I have not been there for twenty-one years. Those were put on a shelf in a row,

like that. That was a ten-shelf oven. I am guessing, but I think there were about eight of those pans on the shelf, and I cooked two ovens full. That would make a complete baking of, I should say, about a hundred and fifty pans. Only a few days elapsed between those two bakings. I cannot remember anything that went on before or after that. They did not want my money. I told them I would go in with them. They did not come back to get my money. I would like to have done it. It is my understanding that James went in with Perky. I never heard of any litigation afterward occurring between Perky and James.

I kept some of the biscuit. I ate them and my babies ate them. We liked them. We kept those we did not eat around for a month or so in a paper box. It might have been longer. At any rate, I had a box full of them. I ate some of them. I would not eat them all. I still quite often eat Shredded Wheat of the National Biscuit Company. I never have eaten any of Kellogg's shredded wheat, and I am not going to, because they had no business to bring it on. I like their corn flakes. I will not eat any of their shredded wheat if I can get the National Shredded Wheat. I do not remember eating the Kellogg biscuit. You give us too little for our money, on the size of them. I noticed the difference in the size right away. I thought we had been skinned on the same thing for the same amount of money, so I did not buy it. I have seen the Kellogg biscuit packages in the stores, I think on the shelves, and I have seen them in the windows. I thought they were so much less than I had been getting. I do not remember having tasted them. I do not give a darn whether I taste them. I can get more for my money on the National Shredded Wheat, so I am not going to work for either one of you. I am going to work for Dick Malone. I do not

want the Kellogg product if it is soggy and heavy. I do not know whether it is. I have not eaten any of it. When I saw it, I had no difficulty in knowing it was Kellogg's. I knew it was cut off. There is a little of it, sure, but darned little of it.

I never met Doctor John Harvey Kellogg at that time. I do not remember whether the corn flakes came out before or after the shredded wheat. I use corn flakes. I like them, and I always insist on Kellogg's. I would not be prepared to dispute a man like James, if he were alive. If Harry James said that Perky only came back about 1893 or 1894 from Texas, I would believe him anywhere. Perky I do not know anything about. That is a matter of indifference to me. I was right there in this cracker bakery from 1876 to 1898. I would place the time of the baking this way: that we sold out to the American Biscuit Company in May, 1890; and it was before that time. Even if other men told me they had records to show Perky got back from Texas in 1893 or 1894, I would not take back what I said. I would stand hitched. I would testify just the same that Perky was not in Texas at that time. I would doubt him if he said that Perky had been down in Texas for several years and only came back in 1893, because I would stand hitched on what I said. Perky used to have opinions about having railroads and other things, and real estate, varied, some opinions between him and other folks, and maybe between me and other folks. I could not get him to the point where he would change. I would not attempt it. I absolutely baked these two bakings for Mr. James. My sole ground for placing this before 1890 is this sale that took place to the American Biscuit Manufacturing Company. My duties as manager continued on just the same after that sale as before. Mr. Crocker was manager for the American Biscuit Company from 1890 until he went to manage a biscuit factory in New

York. I was assistant, and then from that up. I was in the plant all the time from 1876 to 1898. This physically could have taken place, as far as I was concerned, at a later date. I was there and the plant was there. If Harry James had asked me to, I think I would have baked them up to the last day I was there, in 1898. Whether the National Biscuit Company liked it or not, I would have done it. I do not remember whether Milo Smith was there with James; but he talked to me about the proposition. I think that either he got James in it or James got him in it. They were friends. We were all three nice friends. I do not know that Smith was interested in any shredded wheat company at Colorado Springs. He was a real estate man out at Montclair, put on an addition out there. Mrs. Nickerson, my secretary, knew about this baking. She was with me from I think 1885 up to 1902. I called her up on the telephone this morning and asked her if she was dead or alive; I had not seen her for so long. If these men wanted her down here, I asked her if she would come, and she said yes. I got her the job she has, under a darned old Republican. I am a Democrat.

I know nothing about Perky whatever. They always told me they steamed the wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: As I told you, the biscuit I baked for Perky or James looked like the biscuit Mr. Vilas has in his hand. I notice the rather small thread-like pieces of wheat. I do not remember the details, but they were that size and baked up that way. In my drawing, I made this along that way, simply meaning it this way; but then, when the heat got on them, they all ran along in one solid bunch. Perky attempted to get up a biscuit of the size I see here now, before

baking. So, when we got through, we had a biscuit like this one. You realize that is the fact, but that is a darned long time. He was not making another product at that time. He was making this same biscuit.

My recollection is that we took what we call a half-sized cracker box, about six or eight inches high and packed them in, loose. I told Harry that, if he wanted to take them, he could take them. I did not want to run the trays back over yonder, because it jolted them too much to run them back and forth too much, so I gave him the boxes.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not mean to change my sketch, Defendant's Exhibit 107, in any way, as covering my recollection of how the threads looked. They looked as though they were longer. They came out longer threads. That is the way I remember it.

WASHINGTON STURNS.

Deposition taken in Denver, Colorado, April 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am not at present employed. I am a pensioned employee of the National Biscuit Company. I first went to work in the biscuit business in 1887, for Mr. Crocker and Mr. Malone, in the bakery down here on Blake Street, the same place it is now, but a different building. I drove the delivery wagon. I always did for the whole company. I never did anything else. I worked for them all, including the National Biscuit Company, thirty-two years, exactly. Then I was pensioned. I have been living home here in Denver since that time.

I did not really have anything to do with the baking of some shredded wheat that was baked in the bakery, but I saw what they did, a part of it. I saw them fetching it over to the National Biscuit Company—whether it was National Biscuit Company then or not I do not know; but it might have been the American. I remember the Crocker Company sold out to the American at some time. I saw them taking the biscuit over there to bake them? I cannot remember exactly just when it was. I did not pay very much attention to it, but I saw them bringing them over, and I saw them there. I saw them wheel it home, after it was cooked. I saw the biscuit.

I have been familiar with shredded wheat biscuit since that time and used it. I use it now. That biscuit was not very different from the shredded wheat biscuit I use now. It was about the same, I think.

It was my wife who went over to take care of Mr. Malone's son. I remember that circumstance. I spoke to my wife last night, but she does not know the time. It strikes me it was somewhere along in 1891. I do not know, though; I could not tell. It has been so long ago, and I did not pay much attention to it. That is the best I can do about fixing the time, somewhere along about then.

CROSS-EXAMINATION.

THE WITNESS: I did not hear anything about shredded cereal coffee. I do not recall eating any of this biscuit that was baked at that time. I do not believe I did. I kind of did not like the looks of it; and I did not pay much attention to it then, although I saw them coming with it. I talked with my wife last night and she could not help me fix any date. I could not fix it myself.

WILLIAM S. HURD.

Deposition taken at Denver, Colorado, April 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I was a merchandise broker. I have not been in any business for the past three years. I have lived in Denver sixty years, next September. I came here in 1873.

I have heard about Shredded Wheat. When is something I cannot tell you exactly. Mr. Harry James married a niece of mine. He was a young man just out of school, and his father was one of the big stockholders in the Denver Gas Company. He worked for them but in the office there. He came down to me one day and wanted me to come up and see a machine. The party wanted to buy a gas engine and operate it. He said, "It is in your line. It is cereal. I want you to see it." I said all right, and we went up. I do not want to be too positive on the location, but I think it was Seventeenth and Glenarm. Things have changed a little up there. It was not Arapahoe Street. It was in the basement. I saw a couple of cylinders, with the help around it. They put in some wheat, and it turned out this cereal, a long shred. It took me right way, kind of, the novelty of it. He came down afterwards. He said, "You have a chance to get in on that. This fellow is hard up. Do you want any of it?" I said, "Yes, Harry, I would like some of it." He said, "How much do you want?" I said, "I will take what you do not want." He said, "I just wanted to let you in." I said, "Just forget it, then, because I have my business to attend to. Things have got to be developed." He said, "I am going to declare you in." To what extent I was in I do not remember. I do not think I ever put up any money, but I think he did put

in five thousand dollars for a quarter interest. That is my recollection. That was Mr. James.

The time of this transaction was sometime in the summer of 1893. I fix that date by the time of the World's Columbian Exposition, which was scheduled for 1892, but they did not get the buildings done, and they postponed it a year. They had gotten this Shredded Wheat up so that they made some biscuit like that, but we could not do anything with it. We could not get Perky to do anything. It was just a hopeless case. I told Harry, "If we could get Perky to promise to turn them over to Douglass & Stewart" who were manufacturers of oatmeal and rolled oats in Cedar Rapids, I would go to Chicago and meet Mr. Mower and get an engagement to meet him there. He got Perky to do that. He said, if they would take half of it, he would turn it over to them. I went to meet Mr. Mower very much elated. I was used to meeting him. He came out very often. I got him up to my room at the Palmer House in Chicago, and I showed him the article, along in 1893, in the summer sometime. What queered the deal was that the wheat was roasted by somebody here, I do not know who. When he opened it up, it was green with mold inside. He said, "There you are; you can never make a commercial article out of it." I could not talk him out of it. The wheat part had not been evaporated properly, and it was roasted too quickly. That was it. He said, "No, you could not put that on." That was the way they turned down the biggest thing they had ever had a chance to get.

The biscuit I had at that time in Chicago had a very close resemblance to the biscuit lying on the table here, except that that might be a little smaller. I do not remember just about that; but it was supposed to be one portion. I would say this was smaller than the Chicago one. They are of the same shape. Perky

called it Shredded Wheat. The name of the company was, I think, the Cereal Machine Company. When they reincorporated it and changed it to Shredded Wheat Company, I do not know. I had no further connection with Perky and his company, only in the way of advertising the thing. Mr. James was a rollicking kind of fellow. He used to get up parties to go and hear Perky lecture on Shredded Wheat. It was quite a joke when we were around with his friends in the evening. They would joke him about Shredded Wheat. One of Perky's favorite statements was that it was the whole wheat berry, denuded of its silicious—meaning glassy—tar coating. They would say, "Is that denuded of its salacious tar coating? Do not touch it."

I did not go into Shredded Wheat as an investment. I had it just as a flyer; that is all. We got out, after we sold an interest to somebody in Long Island, I believe, some clique there. They had a big factory there, and Harry made me come down with him and attend a stockholders' meeting. We had to wait for people around there, nearby, who had not yet gotten in. I have forgotten the man's name. He was the book-keeper who used to be out here with him. He was engaged in balancing the books, and I offered to help him. I said, "I will go crazy in this little town, if I do not get something to do." That was Worcester, Massachusetts. I offered, and I went over the books with him. Of course, that has nothing to do with it. I found enough about it in the books, though, to convince me we did not want to spend much time or money on it. It was just the way he went after Perky. He did not say that if people would eat Shredded Wheat, it would make musicians out of them. I did not know Mr. Perky before that, at all. I did not know him in connection with the Denver Circle Railroad. I do not know how long before I saw him he had been making this Shredded Wheat. It must have been a few months be-

fore. Anyhow, that is my recollection, because, as I say, we were jollying Harry about it all that time. It was quite a joke, until they got in shape so we thought we might get somebody to manage it.

CROSS-EXAMINATION.

THE WITNESS: When I say Harry, I mean Harry James. At the time he took me to see the machine, he went over to look at it in the Gas Company's place. He had not yet put anything in it, I think. It was after 1892 or just about that time that James put his money in and declared me in, also. I could not say if some of James' money went into Perk's restaurant. It seems to me I have some recollection of his starting a restaurant. I was never in it, and I do not know. I do not know anything about Perky getting any money in regard to Shredded Wheat from anybody except James, at that time. He never got me to put any money in. I never heard of litigation between James and Perky, a few years after that, in which James got it. James did not buy Perky out. He sold the interest, as I understand it, to some people in New England. Then that money he gave bought his interest to get his money back. How much it was, I do not know. He knew Mr. Lindsley, the lawyer here. I never heard of a Western Union telegram in the way of a bill of complaint Perky wanted him to file against James. About that time, however, James sold out his interest to Perky or someone. It was after we came back from Worcester; but I do not know what year that was. I think, if there had been any lawsuit about it, we would have heard about it.

XQ. 42. I show you this photostat of an advertisement which appeared in the *Denver Republican*, Sunday morning, March 11, 1894, containing at the left-hand side, running the whole length, a picture of this Goddess Ceres, with the prominent words *trade-mark*

at the base, where she is standing on the world. (Reading.) Have you ever heard of any advertisement of that sort?

A. If I had, I had forgotten it.

XQ. 43. That sounds a good deal like Perky, does it not?

A. Very much, except that he has not got in there his ability to develop the brain and to develop any natural talents you have got and bring them out.

(A photostatic copy of the ad referred to was received in evidence and was marked "Defendant's Exhibit 108.")

THE WITNESS: He did not say ~~it~~ would make a musician of you there, but it would. He says "The reconstruction of your physical form." That is fine. Maybe that is what is the matter with me. I have eaten it all the time. I have just commenced to gain flesh today, after about twenty-five years.

The rather broad statement that "Absolutely pure food is manufactured only by the Cereal Food Company, 1632 Arapahoe Street" sounds very much like Perky. That is a sample of the lectures we used to listen to. Every once in a while, Harry would get up a group, among his friends, to go to a lecture. I never went to them. Mr. Perky was a very peculiar man, very headstrong. His own brother could not get along with him. He was very domineering. His brother told Mr. James, I understand, that there was no use trying to get along with him. He would not give up an inch; and it was a very discouraging thing to have a minor interest in. I ever heard anything about this Shredded Cereal Coffee, referred to in the advertisement. No doubt that is correct, because it would make ice cream. You could put it in ice cream. They probably took shredded wheat and made some sort of decoction out of it, being a cereal coffee. There was hardly anything

it would not do, and he believed it, I think; because I think the fellow was not all there.

I do not remember going to the Arapahoe Restaurant. I do not think I ever did go in it. I have heard folks talk about it; but I never went in it. Perky was a lawyer. He claimed to have been the inventor, at that time, of this whole wheat product; and he told me how he invented it. He had the flu, and it left him in a condition where he could not keep anything on his stomach. He went into a sanitarium and he could only eat whole wheat. It was all he had to live on. The way he discovered this was by experimenting with the different forms he could put the wheat berry in so as to make it palatable. That is how he discovered this. I do not know about his being away in Texas. He was promoter of the Circle Railroad and the extension they built here. I did not know him then. I understood he was in this district. He built the railroad away back of Cherry Creek, back to where Montgomery-Ward is now, called the Circle Railroad. If he had any money in it, he lost it. Everybody else did. He was not looking for money from James when I met him. James was simply a young fellow the Gas Company sent over. He did not know him. I understood that five thousand dollars of James' money went into it. Mr. James was also connected with the Denver National Bank. His father was one of the promoters of that. When he came over to get that gas thing, Mr. James was quite elated and came down for me. If he had known it before that, he would have come back and said something. Mr. Perky was considered a very peculiar man. We took this book-keeper of his, whose name I do not remember, down to Worcester. He knew Perky's eccentricities and shortcomings, and knew all about him. Perky managed the Shredded Wheat Company at Worcester. I do not know what sanitarium Mr. Perky was in when he was experimenting with the shredded wheat or making

wheat into different shapes. They called his trouble the flue, now; but we called it grippe then. I could not tell you if he was in a sanitarium in Texas.

I understood the shredded wheat biscuit I had down in Chicago in 1893 to show Mr. Mower were just gotten up for a sample. I do not think those were baked at the American Biscuit plant; because I do not think they would have monkeyed with it. I do not think they would have gone to the trouble of making them for him. It must have been some little bake-shop. I do not know whether Mr. Malone put them through the ovens or not. It was the first item I had ever seen in that shape. I am quite certain that, if Mr. James was connected with it and asked him to bake them for him, he would do it; but James did not have anything to do with the matter until around 1893.

The biscuit broken open at Chicago were found to be moldy inside, which spoiled any deal with Mower. They had not been properly baked, and it was hot weather. I had them in my grip; it was very hot; and they were moldy. As to the deal conducted by correspondence with Mr. Mower up to then, the idea was to get the Douglas & Stewart people to take the patent over and run the business. They were cereal manufacturers at Cedar Rapids. I do not think they were given to me as good representative samples of the biscuit. They were just gotten up as a sample of what they were making then. I had them in my grip probably forty-eight hours. I do not know if Mr. Mower is still alive. My impression is that he passed away a good number of years ago. I was not personally acquainted with Milo Smith. I knew of him. I do not think, when James was in there, they tried to make any deal with Milo Smith. He was, of course, with Milo Smith's son, Mr. Salisbury Smith.

I knew Ben Brewer by sight. I had no personal acquaintance with him. I do not recall H. C. Davis. I

would not know anything about the certificate of incorporation of the Colorado Shredded Wheat Company, Defendant's Exhibit 109.

I think Harry James and E. Salisbury Smith were schoolmates together. They were boys together. I guess they went together to the public schools here. I do not know whether they went to the same college or not. They would be in the same classes. I have no recollection of the incorporation of any company. I had no stock in any of it. I never had any stock issued to me. Mr. James had, and he was holding it for me.

I never met John Harvey Kellogg, of Battle Creek, Michigan. I do not know of any other activities of James in a business way, in connection with Shredded Wheat. I really do not know much about his activities prior to the time he took hold of it, until he went out. My understanding was that he went out after we were at Worcester and found things in such bad shape that I advised him not to continue. He wanted him to go down to the Genesee Valley and buy wheat. I said, "Harry, I have been over these books, and the thing is hopelessly insolvent. You do not want to go down there and contract for white wheat for a fellow who has no money to pay the freight on it. Do not even think about it. If there is a grain broker in Worcester, he can get all the white wheat he wants, and you do not have to go down there." Harry suggested that to Perky, and that was all right. He could get it through the broker, so we came home. As far as I know, that was the last time Harry had anything to do with it, except they got others to go to Niagara Falls probably and make a deal with Harry. They took over the Shredded Wheat. I do not think he got very much out of it. I cannot fix the approximate date when I was in Worcester with James. It was quite a while after this day in 1893 I spoke about. Perky wanted James to buy white wheat in the Genesee Valley for him, and my

judgment was they were hopelessly insolvent then. The bookkeeper told me the machine he had in there cost thirty thousand dollars. It was a long roll with six parts. I said, "My God, how is he going to pay for it?" He said, "I do not know, but he has two more on contract." He said he was in commercial production at that time; but, in going over the books, I found a number of firms who were very good, just like a bank, who never left a minute go by without paying a bill. They would always get one and two per cent. discount. They had bills against Frank Sprague and Warner. My recollection is they were so far overdue that, regardless of Perky's statement, they were not sales. They could not have been. They must have been on consignment; otherwise, they would have been paid for long ago. They were regularly in business, had a place of business, a factory, a bookkeeper, and were doing business. They were preparing for a much larger business; but I could not see how they were going to run it through.

They wanted James to go from farm to farm through the Genesee Valley and buy up white wheat. It never was necessary to do that. The broker in Worcester could do it. He would smother him with white wheat, if he gave him an order.

(A duly certified photostat copy of the certificate of incorporation of the Cereal Machine Company, with three certificates of amendment, was received in evidence and was marked "Plaintiff's Exhibit 235.")

MR. VILAS: Mr. Clarke, I have in my hand and have already shown you a letter from the division passenger agent of the Atchison, Topeka & Santa Fe Railway Company, dated April 13, 1933, addressed to Mr. Brace, our manager, with reference to the connection of Mr. H. D. Perky with the Denver Circle Railroad. Owing to the difficulty

and expense of making legal proof of the facts stated therein, I am going to ask you to permit the letter to be copied on the record, with the stipulation that the witness, if called, would testify to the facts set forth in the letter.

MR. CLARKE: Yes, that is perfectly agreeable to me. It is so stipulated that, if called as a witness, he would testify to the facts stated in this letter, and I will ask the reporter to copy that at length into the record.

MR. VILAS: It should be marked as an exhibit and copied at length into the record.

MR. CLARKE: Yes.

(The letter referred to was received in evidence and was marked "Plaintiff's Exhibit No. 236.") (Reading.)

LEWIS H. BRAKEL.

Deposition taken at Denver, Colorado, April 21, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have lived in Denver fifty years, this fall. I am a machinist, with The Denver Machine Shop. I was employed by several companies in the early nineties. I have been a free lance, never married a job in my life, have changed quite often.

I have seen shredded wheat. I recognize the biscuit on the table as some of it. I guess I have been familiar with that forty or forty-one years. I was running a shop of my own. At that time, I was a blacksmith. Since, I have switched my trade, and I have run a shop facing Fifteenth Street, George Leyner. The two come close together at the row. I did work in that

shop on machines for Leyner to make those biscuits. To the best of my recollection, that was about 1892. I did work on part of the machine. I hardened the rolls, some of the rolls. I also remember making an arm attached to the machine, to slide these tables back and forth over a cam; but it was not a success. The function of the table was to build up that biscuit. It was underneath the rolls and was to catch the shreds that came through the rolls, just like my finger would come through rolls, and they would fall like this on this table, but this table would move back and forth, and it would build them up, not zig-zag, but straight in a line, one on top of another. It was sent back and forth in a plane, this way, under the rolls, and piled them up. This lever did not work. Later on, we designed something that did work. We later had a rack and pinion, and that worked fine. I did that work for Leyner. Later I hardened some of the rolls. I can give you an exact drawing of the rolls, in lead pencil. The rolls on the upper machine were this way. I would say this was seven inches in diameter, as near as I can remember. The collar on here is just simply to keep the oil on this bearing from getting on this roll and staining the product. A shaft went right through here. One roll was plain, ground smooth; the other roll was grooved, twenty grooves to the inch, straight grooves around, not like a thread to convey, but straight curved around, twenty to the inch. I remember that distinctly. Those rolls were close together. I expect, under extreme pressure, they would be in contact. That I am not in a position to state. Those rolls crushed the wheat. I saw lots of biscuit made in those machines. They looked like the biscuit that is lying on the table here, after they were baked. Before they were baked is the only way I liked it. The wheat, I understood was cooked in a boiler before it went through the rolls. I believe the time was fifty-five minutes, as I remember

on that. They were very fussy about that time. It had to be a certain length of time to get the wheat at a certain texture before they could dare to put it in, before it would go through the rolls; and then it was put through the rolls and cut and baked. This was at Arapahoe Street, between Sixteenth and Seventeenth, the first I really remember seeing the machines working. They had a restaurant there, and the machines were in the basement. They were selling their shredded wheat in the restaurant. They called it at that time shredded whole wheat.

CROSS-EXAMINATION.

THE WITNESS: When I saw the machines, I do not know whether it was shortly after they were completed. Mr. Berky was his name, if I remember right, though some pronounced it Perky. He was a promoter, and he took a whole bunch of us up there to dinner one day, in the restaurant at Arapahoe Street. I had been in there, possibly two or three times. The machine in the basement had this reciprocating table for piling the biscuit up.

FURTHER DIRECT EXAMINATION.

THE WITNESS: I do not remember delivering the machine to the place of Mr. Perky. I remember installing some machines over here on Seventeenth Street. To the best of my recollection, that was after the restaurant, although I have been informed it was before. We installed the machines. We did not deliver them. They were the power machines for making that biscuit. They had to have the reciprocating table to make the biscuit. I installed those machines for Leyner. That was in 1893.

FURTHER CROSS-EXAMINATION.

THE WITNESS: I had an occurrence at that time that kind of made it a little more prominent, so it would be fixed in my own mind. 1893 was the year of the panic. Two Denver banks, I believe, proved

stable. The rest of them, quite a few, went broke. I had some money in the City National Bank, then at Sixteenth and Larimer Streets, now the Nassau Building. I got scared of this money and took it out. My wife would not keep it in the house, and I said I would carry it. The night we installed this shafting and these machines on Seventeenth Street, we finished about two or three o'clock in the morning. There were no street cars in those days. The horse cars quit at eleven or twelve o'clock. I lived all the way up at Thirty-third Street. I hunted me up a clean piece of pipe, and I got my things ready, and Clarence said, "What are you getting that for?" I said, "Well, Clarence, I have a thousand dollars in my clothes, and, if anybody gets it, they are going to get it the way I got it." I trusted him. I knew him. That panic did not last nearly as long as this one did. We had a Republican in office. It made a Democrat out of me. They had to put Roosevelt in to stop this one.

I would certainly be surprised to find that the machine I am talking about was made after the first of the year 1894. We could not install them unless they were built. I could not have put them in before they were made. If the first little machine was started after 1894, of course, I could not have put them in two years before that.

Seeing the first advertisement of Arapahoe Restaurant on March 11, 1894, I still would be convinced that I put in those machines even two years before they started to be made. Some of the others tell me this was previous to the restaurant. My recollection is that this was after the restaurant.

My recollection is quite clear and it is my belief that it was a machine made by Leyner. I could not swear to it, because, previous to the time Leyner built these machines, I knew nothing about them at all. All I know is that, sometime during that panic that ran

from 1893 for some years, I carried a pipe and a thousand dollars in my pocket. That was when I came home from putting the Leyner machine in. It was set up for more than one machine. They had a lot of trouble with the rolls of the Leyner machines. They would become elliptic. They would bend over or bust or crack, and everything else. We even sent them to Browne & Sharpe, in Providence, Rhode Island, and asked them to make four or six, and they could not make them, although they are considered the best in that line in the United States. We got the steel from their place. Leyner had some little hand machines. I would not want to say they did not have any hand machines in the restaurant, but they had power machines there. This was sometime after the power machines were constructed and completed. The trouble with the Leyner machines and the rolls took two or three years after they started making these machines, before they got the difficulty with the rolls ironed out. In those days they did not have the carburizing furnace. There was no carburizing furnace in the City of Denver. In fact, it was not known. We tried to make them out of cast iron and out of mild steel and cast iron. It was not satisfactory. After that, we tried tool steel. Every once in a while you strike a little pebble in the wheat, which is generally flint. Unless your roll is glass-hard, it punches a hole right into it. It may ruin the roll; otherwise you will ruin your stomach. It will do it, anyway. I would not eat the stuff. Nowadays, they call it roughage. It is fine for cows and sheep and hogs; but that stuff is no good for humans. Some of the rolls would break and some would go elliptical. We got some steel from Brown & Sharpe. Then, we got some from a company in Pittsburgh. We got it from a Moore Company. You might get some data there: We took it over to show them how it busted in the hardening, just a piece, and the next day the piece let go and

busted, just lying on the desk. It was the strain on the metal, and it finally let go, just let go, the next day, lying right on top of the desk. You fellows laugh at that, but I am telling you what happened.

That was a problem. Even when we moved to the other building, we tried to harden it. At that, we had as good success as Brown & Sharpe had. I do not think I was interested in this roller business after they moved to Worcester, Massachusetts. I do not remember about that. The trouble with the rolls ran over several years from the time Leyner first started to make the first machine. Later on, another plant took it on. They thought they were equipped to harden the rolls. Nobody had any success with it. It was too hard to obtain the steel they hardened, without pestering them. Sometimes they would go elliptical. Nowadays, with the carburizing process, they would be a snap. They had grooves, twenty to the inch, half round and half grooved. They were sixty degrees, as I remember and V-shaped in cross-section. They were a little deeper than they were wide, just like a thread would be, exactly, only it was not a thread. It was straight around the roll. By thread, there, I mean a screw-thread, a spiral. They were like that thread, only not spiral. They went straight around. I was working with them off and on, during the whole time they were having trouble with the rolls. I never married a job in my life. I never had one place for a very long period. Since I am older, I have cut that out.

I can go further than that ad, referring to shredded whole wheat bread and shredded cereal coffee. My recollection is that everything they had was shredded: turkey, lobsters, oysters, anything that you ordered was shredded. Everything went through these machines. Of course, I do not know about that. I do not know what they did. I do not know whether they ever saw the machine or not, but everything was

shredded. It was a shredded restaurant. It seems, by that ad, they even shredded their coffee; but I would not swear to that. I remember eating up there and having everything I ate shredded.

When they mention Shredded Whole Wheat Bread in the advertisement, that is what they called the biscuit. I do not know what the Shredded Cereal Coffee was. I knew Mr. Perky then. That was all. I do not know whether he was the inventor of this. He was the promoter. I do not know whether Perky was a machinist or not. I just knew him as a promoter.

CLAYTON K. BRACE.

Deposition taken at Denver, Colorado, April 21,
1933.

DIRECT EXAMINATION.

THE WITNESS: I am manager in the Denver sales department of the National Biscuit Company and have been with the company twenty-six years. I have been in Denver nine years. My territory covers the Black Hills of South Dakota, Wyoming, Colorado, and New Mexico. I personally cover all that territory from time to time. I carry shredded wheat among the products I sell.

We have practically a 100 per cent. distribution of shredded wheat in my territory. Possibly, around 95 to 98 per cent., including retail stores, chain stores, and restaurants and hotels. Taking restaurants and hotels as a class, we do not have the distribution there that we do in the general retail stores.

We encounter competition from Kellogg's Whole Wheat Biscuit. We find more competition among the restaurants and hotels, in proportion, than we do from the retail trade. For one thing, there is the price sit-

uation. Generally, once or twice a year, there is a lower price, including, perhaps, free goods. My experience has been that the product does not repeat in stores in this territory. The dealers will put the merchandise in and many of them will discontinue it after their initial deal of merchandise is disposed of. Theirs is a trifle cheaper than ours.

The institutional, government, and State business in this territory is generally handled by bids; but a quantity of that business is done through the jobber. We are given bids, and we bid on the items. Most generally, the bids are awarded to jobbers, and we find we do not get even half the bids on institutional business. I have yet to recall one bid from institutions designating anything but shredded wheat.

I have eaten Shredded Wheat for probably fifteen years. When I travel, I eat it in restaurants. Generally, Shredded Wheat is not served in a package in restaurants, but in a bowl. I was in Albuquerque last fall, and again in February. The first case, I was served the Kellogg product. I asked for Shredded Wheat. It was served in a bowl.

I spoke to the lady who served it and told her I would like to have what I asked for, Shredded Wheat. She informed me they did not have Shredded Wheat. Later in the day, the salesman I was accompanying succeeded in selling this place, the Franciscan Hotel, two cases of our individual-size package. The following morning I again asked for Shredded Wheat and was again served with the other product. It was served in the package by another waitress. I finally succeeded in getting Shredded Wheat. I told the lady we had delivered a package to them some hours before, and, if she would search in the wareroom, she would find it. She finally came back with Shredded Wheat.

When I went down in February, the same process was repeated. If I would take the time to recall, I am sure I would recall many cases where the other product has been served. I can recall one specific instance in Omaha, sometime last summer, when we had a district meeting there. I remember particularly Mr. Thoms having breakfast with me and three or four other men. In that case, I particularly asked the girl if she had Shredded Wheat, the original Shredded Wheat, and she said she had. I told her I would take it. When she delivered it to me in the bowl, not in the package, it was the Kellogg product. I recall that instance, because Mr. Thoms became quite excited and called over the manager of the restaurant. He merely stated to the manager in my hearing that I had asked and designated the kind of breakfast I wanted and had specified that I wanted the National Biscuit Company's Shredded Wheat, and the girl had brought the other product, and he thought that was unfair. The manager gave him an order for Shredded Wheat, that came out that afternoon.

CROSS-EXAMINATION.

THE WITNESS: I do not recall any instances in which I had told waitresses that the Kellogg product is not shredded wheat, or in which my men have tried to tell them so. I do not recollect that that argument ever came up at all. My men do not, to my knowledge, hold to that in my district. What Mr. Thoms said was that I had ordered National Shredded Wheat and they gave me the Kellogg product and we did not think that was fair. Then, they got an order for National Biscuit Shredded Wheat, from this Omaha hotel.

In regard to the Kellogg Company pushing its product, generally; once or twice a year, there is a campaign on, and, I think, such things as giving away

premiums. In those drives, there is considerable of the Kellogg products placed on the market. I do not remember their using coupons redeemable in free packages. I remember something about dishes.

Right here in Denver, has been quite a strong National Shredded Wheat center, extremely so. I do not mean to say that the Kellogg product has no distribution in this territory, or in this district. I was asked if there was general distribution. I answered that, in this district, there were drives put on once or twice a year, and, about that time, considerable quantities of their products were put on the market.

A year ago, last May, the National Biscuit Company had a drive, at which time they offered the value of one case with twelve. That is all I recall in the way of any special sales effort behind the National Shredded Wheat. The Kellogg Company has put a sales effort and push behind its product and in the restaurant trade right along. They have had campaigns and we have campaigns. I was merely bringing out the point that there is greater distribution when they have put on their campaigns, and the distribution dies out immediately thereafter. It does not repeat to the consumers, not in this territory.

I cannot give you the name of any grocery which carried the Kellogg product and discontinued it, off-hand, but I know it is a fact. I cannot recall the names of any stores. If I were told that Mr. Clarke went into a Skaggs Store and found National shredded wheat selling at ten cents and Kellogg's Whole Wheat Biscuit at twelve cents, and the manager stated he sold almost as many of the Kellogg at twelve as of the National at ten, if they were both equally displayed, I would be surprised to know it. I would be inclined to think the grocer would have to give some personal effort with it. It is a self-service store; but, if you stayed around in some of them, you would find there

is considerable service goes on. I have been with the National Biscuit Company since the shredded wheat business was taken over. They did sampling, which we have continued to do, house-to-house, but we do not do that with wagons. We have crews hired to go out and distribute samples. That has been continued on the same scale as the Shredded Wheat Company did, and we had a very complete sampling in this entire territory last summer. We did not have any the year before that. We came into direct sales of shredded wheat, I believe, two years ago last January. The only free sampling since then was this last summer. It is not true that substantially all shredded wheat salesmen and specialty men were dropped when the National Biscuit Company took them over, that is, in this territory. We operated with a force, maybe not the same men. We have a cereal man here now who operates with the same function the former manager here did. We have had that man since about last June. I only know about my territory. The man in charge was dropped, but another man was put on last June.

We dropped the jobber for a while, and we are still selling direct. We had no particular difficulty with the jobbers in this territory, because of the sale of the product and the demand for it. We found very fine co-operation from the jobbers. We have that co-operation now. I did not say we had no complaints from jobbers. I said we enjoyed a very fine co-operation from the jobbers; but we did have complaints.

I could not say whether the jobbers are pushing our product as hard as any other in that line. I will state one case I recall about a year ago or a year and a half ago. I called on one jobber, the Morey Mercantile Company. I was asked to come to their office. They showed me an order from their cereal branch for

ten cases Kellogg's shredded wheat. The buyer said to me, "We are not handling the Kellogg product. We do not want to handle it. Have your man see our man in Sterling and get him straightened out." That jobber did not handle our cracker line; yet, he specifically stated he did not handle the Kellogg product and he did not want to fill an order for it, because, in his opinion, there was no demand for it. He had an order from the Sterling manager to this buyer to get for him ten cases of Kellogg's. He did not fill it; he gave me the order. He asked me to have our salesmen see the manager in Sterling, and sell him Shredded Wheat, which I wrote him to do and he succeeded in doing. He sold him twenty-five cases of Shredded Wheat. That business was switched to the National Biscuit Company. I have not had that sort of thing happen in other instances. You mentioned the fact we were not getting co-operation, I cited that instance to indicate that was co-operation, which I believe it was. You can draw your own conclusions.

We have used the small individuals in the restaurant and hotel trade. The sale has practically dropped in volume. We put on a drive about a year ago with the smaller package you are referring to; but we have almost eliminated it. The sales dropped off.

The only instance of either shredded wheat product being furnished to me in a restaurant outside the package are those down in Albuquerque. I am sure that was not our own small-sized biscuit, because the waitress came back and told me. In Omaha, I asked for the empty package and she brought it to me. I knew it was not the original Shredded Wheat, because I can tell from the appearance and color of the cakes. These were a little browner. I asked for the National package and I got the Kellogg package. If they were served me outside the cartons, I believe I could tell

which was which. I do not believe an ordinary customer could.

In New Mexico, I sold them two cases of individuals. I do not recall particularly why I did not sell them the big cartons, only that they handled them in that manner, in the individuals, but they took them out of the individuals in the kitchen, to me. I could not answer whether they did that for any improper purpose. It did not strike me as curious that they were taking the individuals instead of the larger packages, if they were serving them outside the package; because, in a carton, there are twelve biscuit which have to be served when the big package is opened. When they are kept in the package, there is a certain degree of protection to the biscuit in the little individual packages, even though not served on the table. It is a cleaner way to handle it. We do not encourage them in any way to serve our biscuit outside the individual cartons. We have never used any serious program in the way of getting the restaurants to open the individual cartons in the kitchen. We just sell the individuals to them and let them do as they please. As a company policy we have never tried to encourage them to use the individual carton by bringing that right out on the table and letting the customer dump his own biscuit out. They have never been told to by our company.

We have had institutional business, army camps, hospitals, and so forth, in the shredded wheat during the time we have been selling it. I have already testified I do not recall a case where they have designated the Whole Wheat Biscuit. I do not recall any case where shredded wheat, twelve and a half ounces to the package, was referred to. If we got a bid calling for a product other than ours, we would contact the institution that sent out the bid, and ask them if shredded wheat, twelve ounces to the package, would be satis-

factory. Then we would submit a bid twelve ounces to the package, thirty-six packages to the case, provided they said it would be satisfactory.

I might say our cereal man mentioned one case here by the City General Hospital, where the buyer had the Kellogg product. When he asked him why, he said he did not know why, but that is what he got. I recall that incident; but I do not recall any case similar to that, of my own personal experience.

If I got a request for a bid that specified, by the number of ounces per package and number of packages per case, the Kellogg product the person had in mind before making up those specifications, I would request permission to bid on my own product. If they gave me permission, I would put in a bid for shredded wheat, twelve ounces to the package and thirty-six packages to the case. I would not automatically change the bid.

We have seventeen salesmen in the territory. The bulk of their profit is on the cracker and cookie business. Our discount system is on an entirely quantity basis. Shredded wheat is just one of several hundred items.

A grocer who buys only shredded wheat and would not buy enough in a month to make more than a relatively small discount, would get a smaller discount than if he bought shredded wheat and the cracker line, if he was an independent dealer. He would have to buy a great deal shredded wheat, one hundred dollars' worth to get 15 per cent. discount. He does get into a better discount differential if he carries the whole National line rather than shredded wheat alone.

We have not had a falling off in recent years in our shredded wheat business, since the depression started. I would say possibly eight or ten per cent; but our shredded wheat volume has held up in better proportion than our cracker volume. The cause of

that is each man's personal opinion. It is hard to tell what would cause it. My own opinion would be that, in the sale of cookies, there are more farmers. They can manufacture and cook their own cookies, rather than buy them. I think that is making the difference. That would be, I would say, a depression condition. The small National shredded wheat, in the individual cartons, has almost gone off the market in my district, because there is no demand for them. I have never had any cases in which I handled the small National biscuit in any other way than in individuals. That has never been, to my knowledge, put into the large cartons. In all the time I have been with the company, that is the only change in size that has ever taken place with the National shredded wheat, as far as I know, just in the little individual package.

RE-DIRECT EXAMINATION.

THE WITNESS: I made it clear to Mr. Clarke that I was merely reciting the instance of jobber co-operation to show that we did get it, in answer to his question.

The situation mentioned by Mr. Clarke, supposing an institution specification for twelve and a half ounces to the package is purely hypothetical, as far as I am concerned. I have never had such a case. The only reason I mentioned that is that, in bids, we have received for our cracker products, it is not uncommon to designate the wrong weight of biscuit. For instance, they will say a five-ounce package of Uneeda Biscuit. It weighs four and a quarter. When they specify shredded wheat, they call for shredded wheat.

(End of plaintiff's depositions.)

DEFENDANT'S WITNESSES.

CLARENCE L. JORDAN.

DIRECT EXAMINATION.

I am advertising vice-president and director of N. W. Ayer & Sons. We handle the newspaper, magazine, billboard and radio advertising of the Kellogg Company. I handle the personal contact between our business and the Kellogg Company.

N. W. Ayer & Sons is the oldest and one of the largest advertising agencies in the world.

Some of the accounts we handle are the American Telephone & Telegraph Company, Ford Motor Company, Kellogg Company, Canada Dry Ginger Ale, National Carbon, Union Carbide & Carbon, Armour & Company.

We have handled the advertising of the Kellogg Company since about 1921, and during that time we have advertised all of the Kellogg products—corn flakes, All Bran, Whole Wheat Biscuit, Pep, Kaffee Hag. We have handled the advertising of the Kellogg Company in relation to Kellogg's Whole Wheat Biscuit from the beginning, as far as 1927 and 1928 is concerned.

In this advertising we follow the same general procedure that we follow on every product. Our first duty is to become thoroughly acquainted with the work. We send our writers in the first instance out to Battle Creek. They go to the factory just the same as one of the men working on the line. They talk to the people; they see the product being made, follow it through in every step and get thoroughly familiar with it.

We also send our men out in the field. We maintain a large corps of men. We extend their time in

the trade to get the general reactions of the public toward different types of product that we must know in order to prepare our advertising. Of course, in that instance those people went out specifically to find out about this particular food product. After they came back, we got their records and put them down. In addition to that, we employed the Medical Arts Laboratory in Philadelphia—that is a separate scientific organization—to make an independent study of Kellogg's Whole Wheat Biscuit, and to tell us at the end of their analyses the truth of the claims and the statements we might make regarding the food value of that product.

We had actual knowledge of the conditions in the trade in relation to the Whole Wheat Biscuit. We have men who do nothing in the world but contact with the trade on the Kellogg Company and its problems.

Our Research Department is concerned primarily with the reactions of consumers towards different types of products and with the reactions of the trade. We try to forecast the type of things that a consumer will want to buy, so that we can meet that desire in the advertisement.

We are concerned with everything that has to do with advertising; we write the advertising, draw the pictures, do all of the work.

The headquarters of N. W. Ayer & Sons are located in Philadelphia. We have at the present time something between 700 and 800 men and women. We have offices in New York, Boston, Philadelphia, of course, Chicago, Detroit, San Francisco. We have two offices in South America and one in London.

The full functions of N. W. Ayer & Sons, if we are retained to help promote the sales of a new product—well, I should say we have two definite functions. The first one and the function that is most vital is the writing of the copy and the making of the pictures

and putting it on paper, the advertisement, but in order to be able to do that successfully, we must know what we are doing, so that research work goes on, doing all of that work—I can perhaps illustrate it best by saying that we have customers, for example we handle Marshall Field in Chicago, the wholesale end of their business. Marshall Field has many people to whom they are putting out style articles. They get to work in the fall, for example, on what the woman is going to wear in the spring. Without a good deal of research you cannot tell what the woman is going to wear in the spring, and we try to do the same type of work.

In dealing with food products we do house to house canvassing. We are just completing one. I had the privilege of taking to Battle Creek about ten days ago a study made of the feeling of personal interviews in six thousand kitchens. We call it six thousand kitchens, because our investigators are required not just to go to the door and have a woman come and ask the question, but in talking about food products they are required to go into the kitchen, and actually see the work, and actually talk with them in the kitchen when her mind is on the subject.

We rather pride ourselves that when we do an advertising campaign for a customer, we start right at the ground floor and follow it all the way through, get in as closely as we can to every move that is made, because a lot of the things that are done, even some of the machinery in the factory becomes at times a basis for an advertising campaign. We made a check-up at the factory and also checked up on the consumers. As a result of that investigation, we started to get together in our mind the classification of this work—that is, what we would have to do, and as we see it, there are only two types of products fundamentally that can be disposed of successfully. Any

product to make a success of advertisingly has got to be something entirely new, something that fills a long-felt want or opens up a new avenue of business, or has got to represent certain improvements of salable differences as compared with anything else of its type on the market. The initial result of our investigation was to classify Kellogg's Whole Wheat Biscuit—Kellogg's Shredded Wheat Biscuit.

As a result of the investigation we classified the Kellogg's product as one which had certain improvements of salable differences as compared with anything of a similar type on the market. Those differences, as we found them in our discussions, were first of all that we had a similar biscuit which, because of its more convenient size, made an appeal to a certain number of women. It was a smaller size. We thought the smaller size was a salable difference, because when he told us that a number of women said that the smaller-sized biscuit was just about the right size for a child and two of them were the size for an adult. Another point of difference, it seems a salable point of difference, was the toasting on both top and bottom, which gave a brown, crisp appearance to the biscuit. Another salable point of difference was the 15 biscuits to a package, and particularly during the last two or three years, the economy appeal as exemplified by 15 servings, if you want to look at it that way, was a salable point of difference, and, of course, the fourth salable point of difference, which was developed later as a result of the Medical Art Laboratory, was the fact that we certified the food value on each of these biscuits, and that every claim was certified by that laboratory.

Well, when we had decided that it was admissible, we, of course, were ready then to begin making our recommendations. Our recommendations were largely based on the fact that since we had a product

which had salable points of difference, but was not an entirely new product, that we should go into what we call a competitive or comparative advertising campaign. That means that the basic policy for that advertising campaign for this biscuit was to establish the difference between it and any other biscuit, or any other similar product, as quickly as we possibly could; this as opposed to an educational type, which we would have done if there had been no competition on the market.

Ready-to-eat cereals are one of the most competitive articles that any one can advertise, not only because of the large numbers that are on the market, but because most of them are highly specialized, and if a person eats one brand, if he eats corn flakes, he will not eat bran flakes. We also consider that we are in competition in so far as ham and eggs—everything that is eaten for breakfast, almost every cereal is highly competitive. Competitive advertising, probably a better word or as good a word, is also comparative. You compare your product in the advertising in a perfectly thorough manner with what you consider part of your competition. You have got to compare it with other cereals, and in this instance we recognized that we had to do some comparisons with the Niagara product. The basic policy was to tell the difference between our biscuit and the Niagara biscuit, which we call competitive. If you like, I can illustrate that better by just showing some of the advertising than I could by talking.

I go back to the beginning of an advertising campaign. The agency side, as we look at it, includes everything that has to do with the marketing of the product. We make our recommendations on the packages; for example, we make our recommendations with all of the advertising that goes to match the package. We make our sales recommendations also, then we go

and get back of that and do our advertising for publication, so I will tell you just how, once we had arrived at the fact that we wanted a comparative policy, we went through with it. We recommend designing. We drew original designs for their consideration. We made up a number of designs. The final design is the working out of several years' packages, so that is not one of our original designs, but we contributed to the step that came up to this.

That is the Kellogg Whole Wheat Biscuit carton with cellophane front. As I say, this has been added to since we started by so many people, that it does not go back to the original design. That has been a step by step process, but we have assisted in every one of the steps.

First of all we have in the Kellogg family covers, red and green, one of the most distinctive package lines in the grocery store. It has been on the market for years, so it is known as the Kellogg family. The Kellogg family products all are products, with the exception of bran flakes, as in this red and green package, so as you go into the grocery store you get this whole picture of the red and green Kellogg packages, as they are the largest manufacturers of bread wheat cereals in the world, so it is probably the best known package. So we felt that was nothing more than that red and green package and the Kellogg name, we had a distinctive package, but it was our desire to go further than that. The first thing, the real reason for this bowl with the two biscuits being on the front of the package, was to illustrate the point which we make in all of our copy, and that is that we have a size package biscuit where two of them exactly fit the cereal bowl.

That was entirely competitive. If you have a picture of two biscuits in the bowl, you can see how different it is from others, and our reason for putting

it on there was to illustrate that point. It is brought out in our advertising copy also. You will notice that this bowl is drawn with a perspective-looking down on it like that (indicating). That is one of the most difficult jobs that we have. We had to make the drawing over at least half a dozen times, because if you put a bowl of cereal down and look at it at an eye level, as you would ordinarily draw it, you do not get the end of the biscuit—any biscuit, regardless of its length. They all look about the same. We were so anxious to illustrate the difference in length between our biscuit and competitive biscuit, and we finally arrived at making this drawing, and it illustrates the point we wanted to bring out. In addition to that, of course, there are salable points of difference as connected with this product.

As to the cellophane, I would like to mention the real reason for the cellophane window, first of all seeing food products through cellophane has become a very big sales point the last few years, and every manufacturer would like to have it if he could. We have tried it on corn flakes and other packages, but while it was suggested that we might have put the cellophane on the side, actually these products are not displayed with the side pointing towards the customer. They are displayed in that (indicating) direction, and the cellophane on the side would not have done it much good, so it had to go where it would do us some good.

In reference to our experience in making these investigations of consumer's condition and state of mind, I can give you an opinion of what we have done, and probably in several thousand stores in the last two years, and that is that in our opinion most women, when they buy them, see the name on the package and they buy carefully. I have never met very many women who have bought without looking. My opinion is certainly that the average woman is a careful buyer.

THE COURT: Are you seeking relief?

MR. CLARKE: None in this case.

WITNESS: I was talking about the points of difference that we had incorporated into this carton, to stress the individuality of our product. I had mentioned the ones on the outside of the carton. We went further than that. We did something that has never been done in the making of cartons for cereal products, so far as we know, and that is a different color of lining to the package, so that after a woman had opened the package and looked inside, seeing this green color in here, she would get something that would strike her as being different from anything she had ever seen.

We went still further than that, and developed a different type of separator for packing the biscuit. Perhaps that is best explained by this exhibit over here.

Separators, as they have been used before, had largely been instruments for carrying an advertising message printed on cardboard, and in this particular instance of ours we developed this new type of separator, which would be entirely different.

Now, coming back just to that point again that I made earlier, in pointing out the difference in this drawing—over here are two biscuits in the bowl. We consider that a perfectly legitimate selling drawing, because you can see how we stressed in that bowl the small size and darker color of our biscuit as compared with the larger size, lighter color of the biscuit on competitive sizes. You can also see the point that I have made, had we drawn our bowl as we did in trying to arrive at the correct way. In that perspective as is shown there, we could not have shown the shreddings of our biscuits as well as drawing in this fashion.

It is common practice to use dishes containing a portion of the contents of the food cereal package. I

have here a number of labels where that is done, on a great many products on the market, which speak for themselves. All food products.

(Received in evidence and marked "Defendant's Exhibit No. 128.")

I have known this type of advertising device that uses a dish with a portion of the contents of the food package ever since I have been in the advertising business, it seems, but I cannot give you a definite date, but I have always thought it was used. I cannot give you the number of years I have definite knowledge that it has been used. I am under the impression it has been used ever since I have seen it. I have knowledge that food products have been illustrated on the label for the last ten years, I can say definitely.

I have completed the comparative analysis of the two cartons as to the difference of matters emphasized in the plaintiff's carton and in the defendant's carton. I am going on from there to carry this policy right straight on through, and show how the same thing was done in the advertising that appears in newspapers. For example, I will not take up the time to read all of this exhibit, just to give you the facts. In this advertising we used them for headlines. This is the first advertising—newspaper advertising that ran in 1927, by the Kellogg Company of Kellogg Shredded Whole Wheat Biscuit, in these headlines. We used the words "Kellogg Shredded Whole Wheat Biscuit." We used those words. We used Kellogg's Shredded Whole Wheat Biscuit in a headline, simply to inform the public immediately that Kellogg's had a Whole Wheat Biscuit on the market.

The first paragraph of the copy in most instances read something like this:

"The very newest flavor treated by the famous Kellogg kitchen, a brand new Kellogg flavor surprise. You will be delighted with this newest Kellogg cereal."

In all instances, beginning right at the first of the advertisement, our first step was to identify our product as the newest product of this type on the market. That same policy carried right on through all of the advertising, down through 1932, all of it is in these exhibits, you can see. In 1928, where we were illustrating our points of difference, 15 biscuits in a package.

This is all newspaper advertising. We did nothing else except radio and booklets, of course. I just want to show one other example here.

MR. CLARKE: I offer these for identification.

(The same were marked for identification as follows: 1927—"Defendant's Exhibit 129 for Identification," 1928—"Defendant's Exhibit 129A for Identification," 1929—"Defendant's Exhibit 129B for Identification," 1930—"Defendant's Exhibit 129C for Identification," 1931—"Defendant's Exhibit 129D for Identification," 1932—"Defendant's Exhibit 129E for Identification.")

WITNESS: Exhibit 129, that is the advertising for Kellogg's Shredded Wheat Biscuit for the year 1927.

(Received in evidence and marked "Defendant's Exhibit 129.")

WITNESS: 129A is the advertising of Kellogg's Shredded Whole Wheat Biscuit in the year 1928, the newspaper advertising.

(Received in evidence and marked "Defendant's Exhibit No. 129A.")

WITNESS: 129B, this is the advertising of Kellogg's Shredded Whole Wheat Biscuit in the newspapers in the year 1929.

(Received in evidence and marked "Defendant's Exhibit No. 129B.")

WITNESS: 129C is the newspaper advertising of Kellogg's Whole Wheat Biscuit in the year 1930.

(Received in evidence and marked "Defendant's Exhibit No. 129C.")

WITNESS: 129D is the newspaper advertising of Kellogg's Whole Wheat Biscuit in the year 1931.

(Received in evidence and marked "Defendant's Exhibit No. 129D.")

WITNESS: 129E is the newspaper advertising of Kellogg's Whole Wheat Biscuit in the year 1932.

(Received in evidence and marked "Defendant's Exhibit No. 129E.")

WITNESS: These represent advertisements run in the newspapers in those years.

(Adjournment taken at this point.)

(Witness excused until later.)

FOURTH DAY.

May 25, 1933.

MR. COOPER: I will first offer in evidence the certificate of incorporation of the Natural Food Company, being a certified copy thereof, certified under the seal of the Secretary of State of New York.

(Received in evidence and marked "Plaintiff's Exhibit No. 254.")

MR. COOPER: Next I will offer a certified copy of the order of the Supreme Court of the State of New York of Niagara County, authorizing the change of name of that corporation from Natural Food Company to the Shredded Wheat Company.

(Received in evidence and marked "Plaintiff's Exhibit No. 255.")

MR. COOPER: I will next offer in evidence a certified copy of the certificate of organization of the National Biscuit Company in the State of New Jersey.

(Received in evidence and marked "Plaintiff's Exhibit No. 256.")

MR. COOPER: I will next offer a certified copy of the certificate of amendment of the charter of the plaintiff, that amendment being as of the seventeenth day of October, 1902.

(Received in evidence and marked "Plaintiff's Exhibit No. 257.")

MR. COOPER: Next a certified copy, also from the Department of State of the State of New Jersey, of the second amendment of the charter of the National Biscuit Company, the plaintiff, this second amendment being as of the twenty-fourth day of November, 1922.

(Received in evidence and marked "Plaintiff's Exhibit No. 258.")

MR. COOPER: I next offer in evidence the next certificate of amendment of the certificate of incorporation of the plaintiff, being the one as of the 12th of March, 1930.

(Received in evidence and marked "Plaintiff's Exhibit No. 259.")

MR. COOPER: I next offer in evidence a bill of sale, dated the 30th of April, 1930, from the Shredded Wheat Company to the National Biscuit Company.

(Received in evidence and marked "Plaintiff's Exhibit No. 260.")

MR. COOPER: Do you admit that the defendant is a corporation?

MR. CLARKE: Yes.

MR. COOPER: As alleged in the complaint?

MR. CLARKE: Yes, I formally admit that. If your Honor please, with my friend's permission—

THE COURT: You are not raising any issue as to the formal jurisdictional averments in the bill?

MR. CLARKE: No.

THE COURT: And are they all admitted?

MR. CLARKE: As to the corporate capacity of the defendant we raise no question. As to the corporate capacity of the plaintiff, we want to take an inspection of those documents.

CLARENCE L. JORDAN.

DIRECT EXAMINATION (Continued)

The cartons which you have marked on the board are the Quaker packages of our different series. They represent all of the products of the Kellogg Company except one, and that one is Kellogg Bran Flakes. These packages are regularly on the market.

MR. CLARKE: I offer those cartons in evidence as one exhibit, marked from A to R, and if there is no objection by my friends, I will have them in as one exhibit on this plaque.

(Received in evidence and marked "Defendant's Exhibit No. 130.")

WITNESS: Yesterday I was just beginning to show the advertising, by years, for the Kellogg Shredded Biscuit, and later Kellogg's Whole Wheat Biscuit.

The first folder illustrates the advertising in 1927, which was the first advertising that we did for this product. That is Exhibit No. 129. As I explained yesterday, the major feature of this advertising was the identification in the headlines with the fact that Kellogg was making a Shredded Whole Wheat/Biscuit. We put that as the major feature on each one of these headings. It did not carry down into all of the small advertisements, but it did carry in all of the larger ones and in many of the small ones. At that time our biscuit had 12 biscuits to the package. We had been justified from the fact that Kellogg made this Shredded Whole Wheat Biscuit, and that it was a smaller size. Those two pages were the first two biscuit pages we advertised.

There are two pages in here. I can read the headings of all of them if you want me to. Well, the headlines are: "Extra crisp Kellogg's Shredded Whole Wheat Biscuit." "New Kellogg's Shredded Whole Wheat Biscuit." Here "Kellogg's Shredded Whole Wheat Biscuit." "Try Them." "Kellogg's Shredded Whole Wheat Biscuit." Then on the smaller advertisement "Delicious," and on this one "Try Kellogg's." On this page of the larger advertisement on the right is: "Order today Kellogg's Shredded Whole Wheat Biscuit, the new way, crisp." The next larger advertisement, "Try Kellogg's Shredded Whole Wheat Biscuit." "Three features you will like, tasty, fits the bowl, just right."

The next exhibit is No. 129-A. That is the advertising that appeared in newspapers in the year 1928. In that year we had 15 biscuits to the package, so we immediately put in as one of our major copy features the 15 biscuits story.

One interest in this campaign is that it shows the development, step by step, of the different features that came in. The headline on here is "Kellogg's Shredded

Whole Wheat Biscuit, browned on both sides." The headline on this one "Here is why they are so popular." In the round circle above that "15 biscuits in each package." That is in every case. "You get so much when you buy Kellogg's." "15 in each package." "It certainly pays to buy Kellogg's Shredded Whole Wheat Biscuit." "Taste them, they are delicious." "A wonderful cereal of a remarkable value." "Each crisp biscuit is toasted top and bottom, and you get 15 in a package."

In these little small advertisements we applied the same ideas as well as we could. "15 in one." "Three features you will like." "15 biscuits." "It is in the toasting both top and bottom, toasted twice." "15 in one, toasted twice." "So crisp." "You get 15." "Just the right size." "Just the right size." "Toasted all over, toasted all over." "And it is new."

Now that completes the advertising for the year 1928. I would like to say this, however, the way this campaign was progressing, we simply got distribution in one market, and then we would break the advertising and move on to another market with the same advertising when the other market was broken. That means, some of the advertising prepared in 1927 and 1928 might have been used in opening new markets in 1929 and 1930, so that while this is the advertising actually prepared during those years, it may have been at different times.

An advertising campaign of this kind covers a series of years. I was just illustrating how we got new points of difference for our biscuit as it progressed.

In regard to the number of years a campaign of this kind would take normally to develop would depend on the success of your work. It might take a good many years, and it may be done quickly. It just depends on how fast the consuming public takes it in volume.

There is a relation between the type of advertising used and in the progress and the distribution of the product that is being advertised. We do not advertise in the market until after the sales force has secured distribution.

This is the advertising for 1929 in newspapers. There were only two proofs prepared new in 1929. As I have just explained, we were using the others for opening markets from year to year. The headlines on these two are: "Served as a toast and a new toast idea." That was some special copy. The first sentence following that is "A new and delicious toast idea, Kellogg's Shredded Whole Wheat Biscuit, heated and buttered." "Many people are eating Kellogg's Shredded Whole Wheat Biscuit in place of toast, as well as a cereal with milk or cream."

The next exhibit is No. 129-A. This is the advertising which appeared—which was prepared in the year 1930. By that time we had received the final analysis from the Medical Arts Laboratory on their independent study of Kellogg's biscuits.

We have dealt with other business than Kellogg. I cannot give a definite answer on it being a recognized institution of standing in that line. We have dealt with them a number of times, but I cannot testify to their size.

We used the analysis of the report from the Medical Arts Laboratory—the food analysis that they made of Kellogg's Whole Wheat Biscuit as the basis for our copy policy in 1930. We also placed on the carton "Certified for Food Value by the Medical Arts Laboratory in Philadelphia." That was another individual point that we brought out in connection with this biscuit, something that had not been done in cereals before.

The headlines in this case, "Modern Wives Realize the Importance of Breakfast."

In order to save time and not read the copy, I will explain that this type of headline was leading into the fact that every mother or every woman should serve a healthful food for breakfast, and the analysis by the Medical Arts Laboratory gave us the facts to tell about what this biscuit contained. It should be a part of the breakfast. We use it for breakfast, and maybe I am wrong.

Each of these advertisements has an illustration at the head of them—each advertisement carries this little seal, "Certified for Food Value." "May be this is why you are tired. Plenty to eat yet. Lucky children whose mothers realize at last. A certified cereal. To a tired business man." And each of these advertisements contains an illustration of the defendant's package of the Whole Wheat Biscuit. "Certified for Food Value. Never before have mothers known a cereal like this. Is breakfast a danger meal in your house? It is not how much, but what you eat, that counts. Now a delicious new food makes breakfast safe. Read how this new cereal helps children make better grades. Your family may have plenty to eat at breakfast and yet be starved. A new contribution to the American table. Delicious cereal biscuits that supply ten important mineral salts."

All the advertisements that I have referred to contained the illustration of the package Kellogg's Whole Wheat Biscuit. The slogan "Kellogg's Whole Wheat Biscuit" is used in the copy. The next exhibit is 129-D. This exhibit shows the advertising that was prepared in 1931 for newspapers, and also illustrates the extent to which the campaign was spreading, showing the different points where the advertising appears.

In this case our advertising appeal was comparative, plus the certified food value. By this time, we had gotten all of our four distinctive points together and

were working them all into advertising, or as many as we could.

The headlines read "Deliciously improved by Kellogg. Try this." Under that is an illustration of the small biscuit with the caption "Deliciously improved by Kellogg." "Try this new Whole Wheat Biscuit, Shredded," and a picture of the biscuit. "Just compare these new biscuits, shredded. To a tired business man. May be this is why you are tired. Lucky children whose mothers realize," and these advertisements down here, "These are the biscuits you want. What an improvement. Here is a new treat. A new taste thrill. Just try this new Whole Wheat Biscuit shredded. Just notice how these Whole Wheat Biscuits are improved."

In all of this series, we are using both pictures and words to explain our points. Here is the certified food value, and here is the toasted top and bottom.

"New cereal helps school grades. Plenty to eat yet. Modern housewives realize importance of breakfasts. At last a certified cereal. Just look at the difference. Just look at this new and different Whole Wheat Biscuit. Try these improved biscuits. Kellogg's Whole Wheat Biscuit are new and different. Kellogg's Whole Wheat Biscuit are new and different. Kellogg's Whole Wheat Biscuit are new and different."

Three ads with those headings. "A new Whole Wheat Biscuit shredded. Deliciously improved. A new Whole Wheat Biscuit shredded. Different in size. Different in crispness. Different in flavor. Seeing is believing. Look at this new and improved Whole Wheat Biscuit."

That completes the advertising prepared for 1931.

Exhibit 129-E, this is the newspaper advertising prepared for 1932, together with the parts where the advertising appeared marked on the map. As the

back to the early days, toasted corn flakes was a descriptive name, and we found it was necessary to put the word Kellogg on the package. We thought it would be a good idea if later on we could develop products that would not have a descriptive name, so that there would be no chance of difficulty, so we brought out a product called Kellogg's Pep. There were no descriptive words on the package at all, just Kellogg's Pep, and then the necessary label designation in small type, required by the Government. That product did not go. It did not sell in large volume. We are studying to try to find out, and we finally came to the conclusion that it was necessary to put descriptive words on the package.

We then went to work and called it Kellogg's Pep Bran Flakes, which was descriptive of the product. As soon as we put the bran flakes on the advertising the sales immediately began to shoot ahead. We had the same experience with Crumbles, where we added the word "Wheat" to Kellogg's Crumbles. That practice has been proved out in those cases. It has been followed by other manufacturers—Post Toasties, for example, added the words "Corn Flakes" to their package, so that when we started to advertise this biscuit, we naturally wanted to do it descriptively.

I know that all of the big sellers on the cereal market are either bran flakes or corn flakes or shredded wheat, something of that nature.

We have a designating name which describes the product and I have knowledge of the methods used by the sales force of the defendant company in the promotion of Kellogg's Whole Wheat Biscuit because I worked with them out on the field.

I am constantly in contact with the Kellogg Company. I sit with them on their merchandising committee meetings, as well as their advertising commit-

tee meetings. We discuss and help to lay out all of the sales and advertising plans.

I receive and read all of the reports from the Kellogg district managers and have to do with advertising and merchandising for the Kellogg cereals.

The sales force consists of district managers and salesmen who call on the jobbers, chains and retailers, and men who also go out and manage the sampling crews, put out advertising in the window, go from house to house on special sales.

From time to time I have been out with them on every one of those jobs. I go out and go with them in their calls, so that as representing my firm, we will be familiar with the work that they do in the field. We require that familiarity in order to prepare good advertising. It is purely a simple research and information that we go out for. I can tell you of one of these journeys that I took in Texas, where the district manager and I got in an automobile in Dallas. We drove across the State in Texas, from Dallas to Laredo on the border. On the way down we met Kellogg salesmen in every point where there was a salesman at the time. We covered his route with him at that time, saw the retailers that he ordinarily covers, not all of them—as many as we could in the day we were with that salesman. I contacted with about seven salesmen in that trip across Texas. These men were salesmen of the Kellogg Company, doing nothing else except selling. We called on the jobbers on the way down. We called on the chain store on the way down. We called on a number of retailers on the way down and of course saw the salesmen.

This past spring I was in the South for three weeks, working with the district manager part of the time in the City of Atlanta, and riding some of our men down there through the different parts of that territory for the Kellogg Company, and getting in-

formation on a new product that had been introduced in the South, where we wanted to get a consumer reaction. By our men--I mean N. W. Ayer & Sons' men. We keep those men, associates of mine—at least one of them—in the field all the time. I am only there part of the time.

I went to California and stopped to see all of the district managers on the way across the country, going out the northern route and coming back the southern route. That was two years ago. I am quite frequently in contact with the district managers in New York and Philadelphia, the two largest districts. I always meet with all of the district managers at the sales conventions. I have called on the Chicago office and work with them; on the St. Louis office and worked with them; the Oklahoma City office; Atlanta, Boston, Denver—almost all of them, in fact.

In my contact with the sales force of the Kellogg Company I observed both the district managers and the salesmen talking to retail and wholesale fields regarding Kellogg's Whole Wheat Biscuit. That is as far as I personally observed. When I was with the salesmen in the grocery stores they were looking for orders. They were selling biscuits, making a general good will of the call and selling biscuits.

We plan the merchandising sales and the Saturday morning sales conducted by the representatives of the Kellogg Company. I have not seen any of these sales on Wholé Wheat Biscuit—not personally.

The Kellogg Company spends a larger amount per case for advertising on whole wheat biscuit than on other Kellogg products of a similar kind. That was done on the recommendation of the N. W. Ayer Company and approved by the Kellogg Company. We recommended this to the Kellogg Company because of the highly competitive work that would have to be done, as I explained, not only in the entire cereal field.

but also because of direct competition, that we would need a larger appropriation per case in order to promote this product successfully than we did on other products that did not have quite so much competition.

This advertising campaign on Kellogg's Whole Wheat Biscuit is developing from market to market as the sales force gets an adequate distribution in the market. They advise the Kellogg Company, who advise us, to release the advertising in that market, and that progresses right along across the country.

The percentage of distribution that Kellogg Company have secured on this Whole Wheat Biscuit, nationally speaking, is 40 per cent. It is not a uniform distribution throughout the nation. We have very little distribution, almost none in some markets, and we have close to a hundred per cent. in others. It is very spotty. The average goes down to 40 per cent., but there is no uniform distribution at all. As to more advertising support in those markets where the distribution runs high—the distribution has to get up around—it has to be above 50 per cent. before we would consider advertising, and usually up around 70 per cent. before we advertise at all.

The advertising has to follow the distribution for the simple reason that when you put an advertisement in the newspaper, it goes into practically every home in the town. Well, now, unless we have a product conveniently located for the consumer to buy, and she reads about it in the newspaper and goes down to the store, and that product is in there, she will not get it, she will get somebody else's, because she will not chase all over town hunting for the store where our biscuit is distributed. For that reason, in order to enable the advertising to work 100 per cent., you must have 100 per cent. distribution. Of course, you cannot always get that, but the nearer it is to 100 per cent. dis-

tribution that you get, the nearer to 100 per cent. value you get out of your advertising.

The Kellogg Company absolutely stands behind the sale of any product that it stocks the grocer trade with. We pick off the grocers' shelves any product that is not passed fast enough to stand in good condition. I always see—I mean the Kellogg Company, we always work together that way—if we find any Corn Flakes or Shredded Wheat on grocers' shelves that are out of condition, we pick it up and give full value on that.

They know, to answer your Honor's question, when we come to them and offer them a product, that they can take that product just the same as they can take an absolute gold bond, because they can not lose on it. We take it up if it went bad or did not sell.

The methods of securing distribution on the Kellogg Whole Wheat Biscuit depends entirely on the market. In some places where we are closing in on a market, say we have distribution, and went in there and got it simply on the strength of the Kellogg's sales force, selling the majority of the dealers which they can do, and we had finally opened that town, and suppose the merchandising committee had decided to close in around that town, all points, then they would instruct the sales force to go out and tell the dealers in neighboring towns to put it in and it would be backed by advertising, in that case we would plan the advertising at the same time we planned the distribution, otherwise it follows the distribution.

In order to create a demand for the Kellogg products first of all the salesmen of the Kellogg Company get good display in the store, that is the primary job. It attracts the eye of the consumer. This shelf-display or ledge display of all the Kellogg products, is one of the most prominent things in the grocery store, and we try to have that right at the front of the

store, so that the first thing that the consumer sees when she comes in, is the ledge display of the Kellogg product.

That display has quite an effect on advertising. It impresses the customer with the green and red family of products.

As to whether it is a more or less effective method of advertising than the newspaper advertising, the best way to answer that is simply to say that that a chain is not stronger than its weakest link. If you are going to do a hundred per cent. merchandising job, you have to have all the things that go into it. Simple display by itself would not be a way of promoting a product for a period of time, neither would newspapers without display. You have to have them together to do a good job.

In the grocery trade advertising by direct display of the product in the store is a very effective means of bringing it to the attention of the consumers.

There have been window displays of the Kellogg Whole Wheat Biscuit. To give you an adequate picture of the extent of the Kellogg advertising, it is necessary to bring in all of our national work as well as the local newspaper work because on much of our national work Whole Wheat Biscuit is included, as are all members of the Kellogg family.

To state it briefly, Kellogg is the largest advertiser in the cereal field, one of the largest advertisers in the world. We use for general subjects, that is, all of the members of the Kellogg family, the booklets I have just given you, going out over our National Radio programs and National magazine programs. Back of that are the individual campaigns in the newspapers of individual products.

Last year, there were 1,300,000,000 Kellogg advertisements published in newspapers alone. All told, there were nearly two billion, including the magazine

insertions and radio announcements. Of course, that is all we placed for the Kellogg Company. I am speaking of the United States. The figures are affected by the circulation of a newspaper. A newspaper with a circulation of 500,000 means 500,000 ads.

I think I have already answered what effect Kellogg advertising would have on the promotion sales of the Whole Wheat Biscuit, as one of the members of the Kellogg family. I said that the Kellogg's Whole Wheat Biscuit was a part of much of that national effort, and that we included it in the advertising we sent out as responsive to the radio requests and as responsive to the magazine requests. It is a part of it.

As to a consumer demand for Kellogg Whole Wheat Biscuit being created by these various advertising and sales promotional methods, publicity kills the possibility of substitution, and in order to fully explain how I can qualify to make that statement, without going very much into our history, we have been in business about sixty years. We have probably been connected with as many commercial successes as any other institution in the world. Our job is advertising and publicity. We know from that experience that when you put advertising back of a product, and throw it out into publicity, if that product is not worthy to stand on its own feet, it will kill it. It will kill it just the same as a man may do things in private life that are not very nice, and nobody knows much about it, but let him go into the public and get the searchlight on him and it will kill him. Advertising does just exactly the same thing to commercial business that publicity does to a man.

As to whether this Kellogg Whole Wheat Biscuit could be promoted in the trade as a substitute or deceptive substitute for any other product, I can answer that in several ways. The first one is we would not be advertising it if it were; we would not handle it on that basis and the Kellogg Company would not handle it on

that basis. No, I do not see how it could. I think the package is distinctive. It has a name on it. It looks like a different product. I do not see how there could be any.

The tear sheets that you have appeared in newspapers and magazines.

(Received in evidence and marked "Defendant's Exhibit No. 138.")

MR. COOPER: Counsel will concede that all of these issued after the defendant's advertisements, to which the witness has referred, were commenced, and practically all of them, since the beginning of 1931, is that right?

MR. CLARKE: I concede that all of these that have the phrase "When you see Niagara Falls on the package, you know you have Shredded Wheat," were issued by the plaintiff company at some time after the defendant company entered the field as a competitor.

WITNESS: They are photostatic copies of the advertising of Shredded Wheat and Krispies taken from all the issues of magazines by our Research Division. These photostats were made from the *Woman's Home Companion*, March, 1903, to and including the year 1916.

CROSS-EXAMINATION.

WITNESS: I have been with the N. W. Ayer Company since 1915, except for the two years I was in the Army. I have been vice-president since about 1929, I do not remember the exact date, and a director since 1930 or 1931. I made part of the investigation which was made before the advertising of the Shredded Wheat product of Kellogg began.

XQ. 188. And when did you begin to make part of it?

A. In 1927.

basic policy of this campaign, we used the news readers' style of advertising, where the advertising is written and paneled after the same manner as a news story. It is a well-known form of advertising that is used quite frequently to give the story, particularly if you have something new to talk about, and that is why we call it the news reader type. If you have news, this is the form of advertising you can frequently take. In this series we use as a lead-in heading, the major item of news, and we identify it in the sub-heading. That is quite generally the policy followed in every case. It is an old editorial practice, and where you tell what happens in the lead-in headline, and identify it in the sub-heading, thus, "New Shredded Biscuit contain iron and vitamin B. Kellogg's Whole Wheat Biscuit certified for Food Value by Philadelphia laboratory." "New Shredded Biscuit making big hit. Grocers say housewives welcome many improvements in Kellogg's Whole Wheat Biscuit." "Many new features for new Shredded Biscuit. Kellogg's Whole Wheat Biscuit set new standard for this type of cereal." "New Shredded Biscuit. Extra good with hot milk, Kellogg's Whole Wheat Biscuit offer many improvements." "Philadelphia laboratory certifies new Shredded Biscuit. Kellogg's Whole Wheat Biscuit pronounced very rich in food value."

These are typical of all the ads. Here is the reading matter of one particular ad: "One of the first things to be noticed about the new improved Kellogg's Whole Wheat Biscuit is the unusually delightful flavor and crispness. The Kellogg Company uses a special process of pressure cooking. This takes in the original flavor. Every shred is thoroughly cooked and therefore easier to digest. The biscuit are then toasted a light golden brown on both top and bottom. This makes them much crisper and crunchier. Economy has

not been overlooked either. Instead of the usual dozen, you get fifteen biscuit to the package. Incidentally, the biscuit are new, convenient size, two just fit the cereal bowl. There is also news in the fact that the Kellogg biscuit is so rich in food value that the Medical Arts Laboratory of Philadelphia, certifies every package. Mothers are welcoming this improved and healthful cereal. They find it equally delightful for breakfast, lunch or children's suppers, serving it with milk or cream, and sometimes adding fruits or honey. Local grocers have this new shredded biscuit. It may be identified by the familiar red and green package. Made by Kellogg in Battle Creek."

Incidentally I might say that that closing paragraph identified by the red and green package and made by Kellogg in Battle Creek, has been a feature of practically all of this copy.

That concludes the newspaper advertising that we prepared for Kellogg's biscuit.

No, I did not receive any instructions from the defendant in any way altering its freedom in the matter of designing advertising. I did not even know that there was anything pending. I thought that with the dismissal of the other suit, it was entirely over.

This is a window display piece. Are these marked with exhibit numbers or are they all one exhibit?

(Same was thereupon received and marked for identification "Defendant's Exhibit No. 131 for Identification.")

The poster exhibits consisting of a number of pieces are marked A, B, C and D, etc. The first one is marked 1930-A, and that is a typical sampling circular. It is the circular that we gave away as we distributed the small samples and the large samples of this product from door to door. This was the advertising announcing the first certified series.

Exhibits marked E, C—if agreeable, your Honor, I will simply mention the broad general classification covered by this material, and not take it up piecemeal. In this material are contained the store cards, posters for windows on grocery stores. I am talking about the card classification, not the individual features, the circulars that go out inside of the cases with messages to grocers. The booklets that we send out in response to requests; on our radio programs, The Singing Lady and Buck Rogers. I simply will say in that connection that on The Singing Lady there have been in excess of a million requests on that program and we are running up around 400,000 of Buck Rogers.

The Singing Lady is broadcast over the Blue Network of the National Broadcast Company, and Buck Rogers has broadcast over the Columbia network. We also include the booklets that are sent out on the Slumber Music, which was also broadcast over the Blue network of the National Broadcasting Company. Also a booklet that we send out in response to inquiries received from our magazine advertising. There have been upwards of 150,000 of those, and the other sampling circulars, I explained them first, and the others are here. Those are the broad classifications covered by all of this material.

That material identifies the Kellogg's Whole Wheat Biscuit—it has the name and most of it has the package illustrated in it. All of it relates to Kellogg's Whole Wheat Biscuit.

The large cartons of Kellogg's Shredded Whole Wheat Biscuit—that is a window—what we call a jumbo carton, used in a window as a display. I just classified that under the window and store decorations.

There has been no difference in the general character of the advertising that has been put out since this suit was instituted, about May or June of last year.

The suit was brought on June 11, 1932. Well, on all of the newspaper advertising which I read—that is all except some of the 1932 books, prepared prior to that time, so that is cleared up all right, because it is so marked in the folder.

As to the poster advertising, I can tell you all of that is definitely prior to this. I would have to guess at the amount in the early part of 1932.

This sampling circular announces the first certified cereal. It is marked 1930-A. These pieces I know were.

They have no mark on them, but they are identified by the Kellogg Shredded Whole Wheat Biscuit package, and I know that was prior—prior to 1932-X.

We have never had any instructions as to the litigation, one way or the other. No instruction to shape the advertising in view of any litigation.

As to 32-B, I cannot say definitely whether that was prepared before or after the litigation. 1930-E was prepared before; 1933-C was prepared afterwards; 1932-I, that was prepared before.

1931-N was prepared before; 1931-K was prepared before; 1930-F was prepared before; 1930-G was prepared before; 1932-H and J, I cannot say definitely; 1931-L was prepared before; 1931-O was prepared before; 1930-P was prepared before; 1930-Q was prepared before; 1930-R was prepared before; 1928-X was prepared before. Now, all of these exhibits are marked with double letters. They have no year mark on them, but they were all prepared before, because they are.

Identified for record they are AA, BB, CC, DD, EE, FF, GG, HH, II and JJ were all prepared before.

There are two that I know definitely were prepared afterwards—these two. 1933-B was definitely prepared afterwards and 1933-C was definitely pre-

pared afterwards. After June of last year. 1932-B, I do not know, and 1932-H and J I do not know.

MR. CLARKE: If the Court please, I will offer as Exhibit 131, all the pieces which have been identified by the witness as having been issued before the present litigation was instituted.

(Received in evidence and marked "Defendant's Exhibit No. 131.")

(Received in evidence and marked "Defendant's Exhibit No. 132.")

WITNESS: Other type of advertising has been the advertising of retail grocers. I will tell you our part in it. Every time we sent out a newspaper campaign, we wrote a letter to the newspapers, and I have a copy of that letter in my pocket, asking them to assist us in getting advertising from the retail grocer.

(Received in evidence and marked "Defendant's Exhibit No. 133.")

WITNESS: Retail grocers advertised the Kellogg's Whole Wheat Biscuit. This is a bundle of retail grocery advertising for Kellogg's Whole Wheat Biscuit. I cannot tell how many tear sheets or ads there are in the bundle, but in all of the bundles together there are approximately two thousand advertisements by retail grocers on the Kellogg Whole Wheat Biscuit and between three and four hundred advertisements by retail grocers on Kellogg's Shredded Wheat. That is including all of the bundles. I do not know how much there is in each bundle.

(The same, consisting of five bundles, was thereupon received in evidence and marked "Defendant's Exhibit No. 134.")

(One bundle of retailer advertising Kellogg's Shredded Wheat received in evidence and marked "Defendant's Exhibit No. 135.")

WITNESS: So far as I know neither Kellogg Company nor N. W. Ayer have anything to do with the preparation of the so-called dealer advertising of Kellogg Whole Wheat. Our part is limited to the letter we wrote to newspapers. We had no further contact with the retailers at all. We do not phrase their advertisements. We collected the newspaper tear sheets—cut them out of the newspapers and put them in our files.

This newspaper tear sheets is the separate package that includes those advertisements which advertised Kellogg's Shredded Wheat instead of Kellogg's Whole Wheat Biscuit. This top advertisement contains reference to Shredded Wheat and Kellogg's Shredded Wheat, both under breakfast foods, but that is not true of all of these advertisements. This is the Kellogg Shredded Wheat advertisements. There are two bundles of that.

(Received in evidence and marked "Defendant's Exhibit No. 136.")

(Bundle of tear sheets offered in evidence and marked "Defendant's Exhibit No. 137.")

WITNESS: Some of these advertisements used the terms Whole Wheat Biscuit and Shredded. In the first place, we wanted to describe the product. We had found in the experience that we had had in advertising cereals that there has been no cereal developed into great volume on the American market, no ready-to-eat cereal, unless the name of that cereal was descriptive, or the descriptive words used on the label and in the advertising. Naturally with that experience back of us, we wanted to describe the Kellogg Biscuit as completely as we could. We used the words Shredded and Biscuit and Wheat in order to describe the biscuit.

Yes, I can mention one or two products which were advertised at first under special names. Going

I could not tell you the output. I would not like to guess. One or more packages with the cellophane window in them are put in each case of goods sent out. There are some stores that will not and some get all cellophane windows. I heard a district manager say that he was not ordering anything in his territory except cellophane windows.

Plaintiff's Exhibit 4 is one of the type of cartons which has a light green color applied to the pasteboard inside of the carton.

The carton that we started to put out last September is the one like you hold in your hand.

(Same marked "Plaintiff's Exhibit F for Identification.")

That is the one that had the corrugated liners as distinguished from plain slips of paper. The green lining or green tinting on the inside is practically invisible through the window to your eye. All that one can see there is the oval ends of one row of biscuit and the tops and bottoms of the adjacent rows below and above and the separator.

The clipping from the *Bangor Daily News*, April 11, 1931, is an advertisement of Kellogg's Whole Wheat Biscuit; I am sure that it is in the bundle of advertisements which I have produced. I would have to look up the record to be absolutely certain. I assume it is one directly from Kellogg Company through our company. It looks familiar to me. The cuts that appear in the advertisements of *Marion Star*, Marion, Ohio, April 3, 1931; *St. Paul Dispatch*, St. Paul, Minn., April 9, 1931, were furnished by N. W. Ayer & Company. We drew the cuts of the biscuit. No, I do not think that is a cut that more closely resembles Shredded Wheat Company's product than it does the Kellogg Company's product. I am sure that the artist who made the drawing had a biscuit of Kellogg's

to draw from. Our company furnished the cut of the saucer with the two biscuit in it for the advertisement in the Lancaster, Ohio, *Daily Gazette*, April 3, 1931, but we did not place the advertisement of the *Home Dairy*, Lancaster, Ohio, who are not customers of ours. I assume that cut was furnished to them by the Kellogg Company from our cuts. The drawings of the cuts are not made by our agency artist—we buy our art work on the outside, but they were bought by us and made under our supervision.

The drawings represent Kellogg biscuit as distinguished from the Shredded Wheat Company's biscuit, but not as well as we finally made it after some more trials.

We had some difficulty in the perspective in making pictures that distinguished Kellogg Company's biscuit from Shredded Wheat biscuit—when you look down along the flat. You do not show length as well when you use a perspective. It was easy in this kind of drawing. I mean the type of drawing in the *Jamesville Daily Gazette* of May 19, 1931.

In Exhibit 129-D—advertising of 1931—there is a sheet headed 1ABM 1931, and beneath the picture of a wheat biscuit in the reading matter in the lower quarter of the sheet are the words "Wonderful new flavor"—that was the flavor in the Kellogg Biscuit—the flavor in the Kellogg Biscuit as it had been since 1927. The way you cook it gives it a flavor. The product has a flavor. There is a difference between the flavor of the Kellogg biscuit and the flavor of something else—the something else is any other type of Shredded Biscuit. I am familiar with the Shredded Wheat Company's biscuit since right after the war. It would be very difficult to put into words the "Wonderful new flavor" of Kellogg's. If I knew how to describe it, I would put it in the copy.

I do not know that I have ever tasted the biscuit described by Dr. Oakes as having been made on what he called the automatic machine where there was toasting on both sides.

Our company did not make the drawing with the two biscuit in it. I cannot give you the date on those cartons. I do not remember that. We get into the making of the carton and carton design—we make our suggestions sometimes six months, sometimes a year before they actually come out in the production of the factory. You will have to ask one of the factory men about cartons, because I do not know.

The difference between the picture of the dish with the two biscuit on Plaintiff's Exhibit 1 and the dish with the two biscuits on Plaintiff's Exhibit 5, was we got a darker biscuit and a deeper perspective in the Exhibit 5—Plaintiff's Exhibit 5—as compared with Plaintiff's Exhibit 1.

The drawing that I was referring to (cuf of Plaintiff's Exhibit 5) and the drawing that we used in our advertising, is similar to the drawing that is used on other packages. We make the original drawings that are used in the advertising. They frequently place them with the artists who make the packages. What I was really referring to was the number of times we made those drawings for the advertising placed on the package. Our company did not make this drawing that appears on this carton—no, we did not. We made the original that was used in advertising matter of which Kellogg made the drawings that go on the package. We never made a finished drawing that went in any of these packages. A word to explain it is in the nature of the rough suggestion to the Kellogg Company, where we would make these in pencil or in color on tissue paper and give to their advertising department.

Our company made the cuts contained in the large mass of advertising introduced here in the direct examination. We made the cuts and the advertisements. We did not approve the cartons. That is a matter that is done by Kellogg. We talk it over with them and give suggestions, but the approval of the carton is their responsibility, and not ours. We design the advertising ourselves and they approved it. We did not design the carton, Plaintiff Exhibit 5.

I have never seen the answers to the interrogatories in this case.

MR. COOPER: Counsel has tendered to me recently during the trial a large number of photostats of purported advertisements of the Natural Food Company in its original name, and the Shredded Wheat Company I suppose in succession, which counsel said in general ran from 1903 to 1916. I raised no questions that those were authentic advertisements issued by that company under its several names at about the time the periodicals purport to bear date.

MR. CLARKE: I offer those in evidence as one exhibit.

THE COURT: No objection?

MR. COOPER: None.

(Received in evidence and marked "Defendant's Exhibit No. 139.")

MR. CLARKE: I also offer this pamphlet entitled "Uneeda" which is conceded to be an advertisement of the plaintiff, dated December, 1932, and January, 1933.

THE COURT: No objection?

MR. COOPER: I have no objection.

(Received in evidence and marked "Defendant's Exhibit No. 140.")

MRS. GRACE BURNS.**DIRECT EXAMINATION.**

My husband's name is Lester and I have one daughter, sixteen years old. I am a housewife and am a user and consumer of the product known as Kellogg's Whole Wheat Biscuit. I do not remember how long have used that product, but it is several years, probably three years or something like that.

I have known it as Kellogg's Whole Wheat Biscuit. I happened to see the package in the store and as I always used Kellogg's products, other products and I liked the size of the biscuit and I tried it.

My first package I purchased in a service grocery store. I just asked for a box of Kellogg's Shredded Wheat, as soon as I had seen it on the shelf, because I had used their Corn Flakes and I saw the small biscuit which was a better advantage for me to use, and just tried it and we have used it ever since.

Previously to knowing Kellogg's Biscuit I had known the other biscuit, the Niagara Biscuit, and used it. After making a comparison between the two biscuits I continued to use the Kellogg Biscuit. One reason for preferring the Kellogg Biscuit was the size. It just seemed the right size, and another reason was that it was brown, it was much browner than the other biscuit and every one seemed to like them better—the preference seemed to be a general preference. The main thing was the size because the other biscuits were so large and there was always just a little more than they wanted with the breakfast, and that was really the main reason that I continued using this biscuit.

I recommended Kellogg's Biscuit too there beside members of my family, because I liked it so well myself, I will say that truthfully.

I came here today to testify because an agent was sent from the grocery store to me. A man came and

asked whether I used Kellogg's Biscuit. I had never seen the man before, and I do not know any one connected with National Biscuit Company or the Kellogg Company.

In ordering the biscuit I ask for Kellogg's Whole Wheat.

CROSS-EXAMINATION.

I live at 1125 West Street, Wilmington.

How I came to buy my first package of Kellogg's Whole Wheat Biscuit was because I saw the small size of the biscuit on the package—that was really the first thing I noticed. I saw the sign of the biscuit on the package on the shelf, and that is one reason, and then it was narrower. I do not know whether that picture was always there, but I know it was a different shaped package from the Shredded Wheat. I do not remember whether the package I first saw had a cellophane window in it or whether two biscuits were there at that time or not. It was like that package—pointing to Plaintiff's Exhibit 2.

(Same was thereupon received and marked "Plaintiff's Exhibit E for Identification.")

I was able to tell from the package that Kellogg's Biscuit was shorter than Shredded Wheat Biscuit by the side there. Is not this biscuit packed in the same way as this one? I have forgotten because it is quite a while. The package might have been exhibited either end to me or face to me and in either event since it was this package I observed that it was Shredded Whole Wheat Biscuit and asked for it for that reason.

I knew the product that I had used prior to that time as Shredded Wheat.

As to the package that I saw I do not remember whether the face of the package was exposed, or whether it was the end of the package.

RE-DIRECT EXAMINATION.

RDQ. 56. What kind of biscuit is this Kellogg Biscuit?

A. What kind? I do not know, it is very good, that is all I can say.

RDQ. 57. It is a wheat biscuit?

A. It is a wheat biscuit.

MR. CLARKE: That is all.

MR. MORRIS: That is all.

By MR. CLARKE:

RDQ. 58. What kind of biscuit was this biscuit you used before you used the Kellogg biscuit?

A. It was a wheat biscuit.

MR. MORRIS: Will you mark that E for identification, and then we will find out what the exhibit number exactly like that is, and then stipulate that that is Plaintiff's Exhibit for identification.

(The same was marked "Plaintiff's Exhibit for identification.")

THE COURT: I would like to ask whether not the state of the record is satisfactory in regard to the tender of that pleading, in evidence.

THE COURT: The tender is withdrawn.

MR. MORRIS: I thought since I have missed something in the beginning of all this trouble, I thought I had better take the blame for it.

THE COURT: Thank you very much.

MR. CLARKE: I suppose the record then is complete, without any motion to strike.

THE COURT: The record is complete. You are standing on proofs.

MR. MORRIS: We are standing on admissions.

THE COURT: Admissions in pleadings, certainly.

HAROLD F. MUNTZ.**DIRECT EXAMINATION:**

I specialize in institution and restaurant sales for the Kellogg Company. I have been employed by the Kellogg Company slightly over six years. I am twenty-eight years old.

The nature of my duties with the Kellogg Company is to work with the district sales managers and Kellogg salesmen in the development of institution and restaurant sales of Kellogg's Whole Wheat Biscuit.

I work with the Kellogg salesmen calling on institutions in an effort to encourage institutions to use the various Kellogg products, including the Kellogg's Whole Wheat Biscuits.

We always interview first the buyer and the dietitians in an effort to have them fully acquainted with the entire Kellogg line. We talk to the buyers about the convenient sizes of the Kellogg biscuits, about the number of biscuits packed in a package, and about the price of the various Kellogg products.

We talk to the dietitians about serving the Kellogg products to the inmates in an institution, and of the food value of the Kellogg's Whole Wheat Biscuits.

In the course of developing institution business we call on all types of institutions, including private institutions, State institutions and Government institutions.

By this I mean we endeavor to call on every place where there are more than twenty-five people eating in the same dining room; that is, we feel that it is worth our while to call to see the buyers and dietitians of institutional outlets where more than twenty-five people are served.

That takes in three very distinct classes; the private institutions which are the city hospitals and orphanages and sanitariums that are in no way connected

WITNESS: I cannot give you the date definitely. I do not remember.

I was one of the men who were sent to the factory in that early investigation. We just went to the factory at Battle Creek—the Kellogg factory in Battle Creek.

No, I did not send men at that time or subsequently to the factory of the Shredded Wheat Company at Niagara Falls. So far as I know none of our people have ever been in there.

When I talked about the kitchen count, I was referring to the work that we do, and I said that we had just completed a 6000 kitchen count.

In the early days of the preparation to take over the advertising of Shredded Wheat product of Kellogg, we investigated to see what the demand was or would be for that product—that investigation included both calls on the retail trade and calls on women to determine their preference for that type of product. These investigations were made primarily in our branch offices in Philadelphia, New York, Boston, Chicago, San Francisco. Those offices took charge of some sort of a canvass of homes to ascertain largely the demand for wheat cereals. We were interested in the entire field of wheat cereals. The investigation started around 1927 and is still continuing. The investigation did not include an examination into the demand for the Shredded Wheat. The reports when they came in included Shredded Wheat. There are several hundred. The reports could be produced for inspection if they are still on file. I doubt very much whether they are.

I was informed of the result of these investigations, and whatever information came in those reports with reference to Shredded Wheat we ascertained the fact stated in the reports at about the time they were delivered to our company.

We did not get a clear idea as to the existence on the market over such part or parts of the country as the investigation covered of Shredded Wheat. We were not really asking for that type of information.

From the investigation we did learn something about the product Shredded Wheat. Before the investigation was put on I personally knew about that product, both by name and by the pillow-shaped biscuit.

At the time of the investigation—what we were trying to do at that time, and what we were doing at that time, was asking what people thought of a biscuit of our size. We were not asking about the demand for a product. We were asking about what they thought of a biscuit of that size and general shape, and so on. It was not a demand investigation at all.

I do not know how many of the several hundred reports made mention of Shredded Wheat, such as Exhibit 1.

I should say that I have known personally of Shredded Wheat, such as exemplified by this Exhibit 1, since after the War, around 1919, or somewhere around there. Other members of the organization of N. W. Ayer & Company also knew the product like Exhibit 1.

As I stated previously there has been no big market made for a food product unless the name was descriptive of the product—that is based upon all the experience of our company, not only in advertising itself, but in noticing advertisements of others who did not retain us as their agents.

Yes, I know a cereal called "Force" which name is not descriptive of the product. It has been a failure ever since I heard of it. It has been off the market in this country. Yes, I have seen advertisements of it recently. They are coming back, but they certainly have not started to sell.

I have heard of cereal called "Grape Nuts." That name is not descriptive of the cereal. "Grape Nuts"

is in wide distribution throughout the United States, but it is not a leading seller. I mean a product that sells up into volume, such as we consider a leader, in big volume. I would estimate that there are not being sold annually in this country fifteen million packages of "Grape Nuts." I agree that then the name is not descriptive.

In connection with our investigation, preparatory to advertising Kellogg Shredded Wheat, we did not make any computation or get any figure to show the output of the Shredded Wheat Company.

We did not design the first carton put out in 1927 of the Kellogg Shredded Wheat. We suggested a number of designs for their carton, but the final work-out was done through the addition of a lot of things and a lot of advice.

I am familiar with Plaintiff's Exhibit No. 2. As far as I know that was the first put out in 1927 by Kellogg for shredded bisenit. I cannot tell exactly, but so far as I know it is. I do not think, in fact I am sure none of our suggestions went into the design of Plaintiff's Exhibit No. 2. Our suggestions were very largely taken on the others.

Plaintiff's Exhibit E is the one which was made from our company's design. They worked that out in spots. That was used pretty generally. That is the course of standard. You recognize that—meaning the colored name; that is all standard and does not require redesigning. The carton like Exhibit E came out some time in 1928.

I recognize features on Plaintiff's Exhibit 1 that we discussed and asked them to work out. We discussed the representation of a dish with two biscuit in it, but we did not make that drawing. We suggested this panel on the side and we worked with them on these suggestions. They were not original with us.

No, the two biscuit in a dish do not fairly represent Shredded Wheat Company biscuits. They represent Kellogg's biscuit fairly accurately.

Plaintiff's Exhibit 1 was designed and put on the market about 1930. I do not remember the exact dates of those cartons.

I cannot tell if Plaintiff's Exhibit 4 represents the carton after the one last inquired about. I recognize it as one that our company at some time helped to develop and recommend. So far as I know it is the first one with the window in one broad size. The date I cannot give.

I examined a large part of the mass of newspaper advertising, not all of it. I do not recall having seen a copy of a part of the *Tampa Daily Times* for Friday, July 8, 1932, containing an advertisement under the heading of Piggly-Wiggly Store; Kellogg's Shredded Wheat, Pkg 9¢. That advertisement was not included in the large bundle of newspaper advertising which was introduced on direct examination. It was not withdrawn from those before production here. Those advertisements that were produced are not complete copies of every grocer's ad.

I observe that Piggly-Wiggly in the advertisement in question uses the word "Kellogg" in the smallest lettering of the advertisement proper and the words "Shredded Wheat" in much larger lettering. I also observe that Piggly-Wiggly puts a representation of the Shredded Wheat Company's package in its advertising.

The Kellogg Company furnishes cuts, as they are called, to the grocers for their advertising.

I have been told that the Kellogg Company worked on the pillow-shaped biscuit before we took over their advertising, but they were not making them at the time I first visited them. I did see the biscuits in the factory before the advertising began, and they ex-

plained to me the advantages that they had in their size biscuit.

From the time we first began to contact with the Kellogg Company, it has been a subject of conversation between the Kellogg Company's representatives and representatives of N. W. Ayer & Company as to the resemblances and points of difference between the two biscuits.

I should say that we did form an opinion from the investigation that was made as to the consumer demand that had been created by advertising for the Shredded Wheat Company's Shredded Wheat.

I did say that the company—N. W. Ayer & Company—has been in business sixty years and that when you put advertising behind an imitation, it will kill it.

I have no case in mind of any of N. W. Ayer's customers being held to infringe other's trade-mark rights.

I can recall conversations and reading about instances in which things which have been extensively advertised have been held to infringe somebody's trade-mark rights. I have no personal knowledge of them, but I imagine it is true.

Mr. Cooper, the question was substituting and not infringement. The statement that I made was with regard to the practice of substituting. Perhaps we look at the definition differently, but an infringement would not come within that statement of mine.

There are about 300,000 retail grocery stores in the United States. In about 120,000 of those there is Kellogg's Shredded Wheat for sale—about 40 per cent. distribution. Actual information about the number of retail stores in which there is on sale today Kellogg's Wheat Biscuit or Whole Wheat Biscuit product, can, I think, be received from the record of the Sales Department at Battle Creek. I based the 40 per cent. distribution on information from our sales depart-

ment. What I gave this morning was on information and not on my knowledge. For information regarding distribution you would have to go to the Kellogg Company.

As to the amount of money the Kellogg Company has spent in advertising the packages which have the words "Shredded Biscuit" substantially as prominent as on these Exhibits E for identification and 2, as distinguished from those like Plaintiff's Exhibit 1 and Plaintiff's Exhibit 4, that give the prominence to Whole Wheat, we have the actual figures here; of course, I can figure out from them right away the proportion.

We do not keep the figures for the advertising that they pay in Battle Creek—that is the store material and that nature. We spend about ten times as much money on the Whole Wheat Biscuit as on the Shredded Wheat Biscuit. That includes all of the different varieties of package in the one group, which has Shredded Wheat Biscuit in prominent letters, and in the other all of the carton that has the Whole Wheat in prominent letters. We have put about ten times as much advertising expense into the cartons which have Whole Wheat in prominent letters, as we put into the cartons that have Shredded Biscuit in prominent letters. It was two and one-half years before they began to put any out with the Whole Wheat in prominent letters, that would make it 1929. Either the end of 1929 or the first of 1930, according as the date goes forward or back.

Cartons put out by Kellogg like Plaintiff's Exhibits 1 and 4 have been displaced. There is a new carton. We have not featured the cellophane window in advertising at all. I could not give you their manufacturing output. That is usually discussed as an advertising package of which there will be a certain percentage to a case. Some stores get more than others.

WILL K. KELLOGG.**DIRECT EXAMINATION.**

I am a food manufacturer, president of the Kellogg Company. I have been in the food business upwards of forty years. The Kellogg Company was organized in 1905. It was the Battle Creek Toasted Corn Flake Company at first, and afterwards it was changed to the Kellogg Company. Then that was succeeded about 1922 by the present company, The Kellogg Company. I have been president of these companies throughout the period from 1905 down to the present time with the exception of two years when I was chairman of the board.

The product that the company manufactured in 1905 or 1906 was Toasted Corn Flakes.

I am unable to give the exact date when the company began to manufacture any other products besides Toasted Corn Flakes, but within five or six years after our organization we began to add foods, different foods.

I think it was around 1910 when the company began to experiment with any wheat biscuit in shredded form, and the product was put on the market about that time under the name of Whole Wheat Biscuit, Shredded Wheat Biscuit. The correct name was Kellogg's Toasted Wheat Biscuit. This product was on the market for about six years until war time—was on from 1910 until war time.

This product was a biscuit made from a dough which had been partially cooked and that was shredded, made in the form of biscuits placed on pans, a coverpan was placed over the biscuits and it was then baked in an oven and that constituted the biscuit.

At first this product was composed wholly of whole wheat, but later it was not. At first it did contain sugar and salt flavor and some malt flavor, but

later, during the war period, it contained other grains besides wheat. We were restricted by the authorities at Washington from using so much wheat. We used corn and rye. That particular biscuit was a very edible product, but we found that it was impossible to control the weights. The weights were over, overweight. The package first, I think, contained about ten biscuits and afterwards twelve, and would weigh from —well, it varied from 14 to 16 ounces and sometimes a little more. It proved to be rather unprofitable due to the fact that it was overweight. The admixture of other grains ruined the palatability of the biscuit. It was not as palatable as it was when composed entirely of wheat.

The advertisement you show me is an early advertisement taken from *Munsey's Magazine*, in colors, of Kellogg's Toasted Wheat Biscuit, published about 1913.

The one marked A on the second page is a leaflet of advertising Kellogg's biscuit by different names, indicating the date when it was published or used. That was about the same time as the advertisement, I think.

B is a six-page leaflet, advertising Kellogg's Toasted Wheat Biscuit, published about the same time, or used about the same time. C is about the same type. There is a picture of the factory and the original factory where the food business was started in Battle Creek. D is the advertisement from *Home Life* of Kellogg's Toasted Wheat Biscuit, which appeared in *Home Life* about March of that year.

E is a cut-out of a counter display sign, advertising Kellogg's Toasted Wheat Biscuit, on a plate—a saucer. Two of the biscuits being illustrated in the saucer.

(Received in evidence and marked "Defendant's Exhibit No. 145.")

WITNESS: That biscuit went off the market during the war time and that identical biscuit was never manufactured after that period. We continued the experiments in our laboratory in the factory for some time, and we brought out another biscuit about 1922—another Shredded Wheat biscuit. I think it was called Shredded Wheat Biscuit. Yes, the name Kellogg appeared on that—"Kellogg's Toasted Wheat Biscuit." That was a carton like Kellogg's Shredded Whole Wheat biscuit carton which you have here, with the exception that the name at the bottom was "Kellogg's Toasted Corn Flake Company instead of Kellogg Company. There were some pictured in colors, a green and a red.

The carton you show me is one of the cartons put on the market by the Kellogg Toasted Corn Flake Company in 1922. It has some of the old biscuit in it, which are small in size and well toasted.

(Received in evidence and marked "Defendant's Exhibit No. 146.")

WITNESS: The advertisement marked G is from some local magazine, full page; H is an illustration of a girl with a package of Kellogg's Toasted Biscuit and I is an advertising page in colors taken from the *Field and Stream* magazine, August 20th, but I do not see the year, and Kellogg's Shredded Whole Wheat Biscuit.

Kellogg's Shredded Whole Wheat Biscuit of 1927 was manufactured for five or six years and how long it remained on the market after that period I cannot say. The one of 1922—I suppose you refer to the one I have been testifying about—that was on only a short time. That is Exhibit 146—my recollection is that it was on for less than a year, or about a year or less. As to the carton, I believe it was the same carton.

About 1926 or 1927 the company put Kellogg's Shredded Whole Wheat Biscuit back on the market with another biscuit and it continued on the market with an increasing trade. The name was changed. I think it was put on first as Shredded Wheat Biscuit, Kellogg's Shrèdded Wheat Biscuit. Afterwards it was changed to Whole Wheat Biscuit, Kellogg's Whole Wheat Biscuit.

The carton, Plaintiff's Exhibit 2, is Kellogg's Shredded Whole Wheat Biscuit manufactured by the Kellogg Company. The net weight is nine ounces, the package states. Plaintiff's Exhibit 3 followed Exhibit 2. It is Kellogg's Shredded Whole Wheat Biscuit. 15 biscuits.

I do not think the size of the biscuit has changed between 1922 and 1927 and the present time.

The biscuit taken from Exhibit 146 is the same size that we continued to use after changing from the larger size. The larger size was discontinued in war time.

The original name—Sanitas—of the corn flake product under which it was advertised was placed at the top of the package in small letters. It was only used for a short time, and then it was sold as Kellogg's Toasted Corn Flakes, but I think at the time the Sanitas was on the heading of the carton, that W. K. Kellogg or Will Kellogg was on the end of the package "Non-genuine without this signature."

The corn flake business was purchased from the Sanitas Nut Food Company. The Sanitas Nut Food Company was Dr. J. H. Kellogg of the Battle Creek Sanitarium. He owned it.

The Sanitas nut foods were foods packed in cartons. I think there was something like a hundred of them. I cannot describe them all. Some of them were made from nuts, cereals, different preparations, quite a large variety.

The carton that you show me is one of the original cartons which was used at the time the business was taken over by the Battle Creek Toasted Corn Flakes Company from the Sanitas Nut Food Company.

(Received in evidence and marked "Defendant's Exhibit No. 147.")

WITNESS: The product was sold as Toasted Corn Flakes. We endeavored to control the market by having the only toasted corn flakes.

After removing the name "Sanitas" from the package, we used the name "Kellogg" and continued to do so to the present time.

Dr. Kellogg was my brother. At the time the name Kellogg's was put on that package I am not positive that we were the only concern manufacturing Toasted Corn Flakes, but I am not sure.

We encountered competition—severe competition within the first year.

The name has been added to each new product as brought out, and includes the bran, All-bran, Bran Flakes, Kellogg's Krumbles, Kellogg's Wheat Krispies, Kellogg's Rice Krispies and Pep. The name Kellogg appears from six to nine times on every package.

There is a very great value to the name Kellogg due to the fact that it has been advertised so many millions or billions of times.

It is a very easy matter to introduce a new product to the grocery trade just on the name. The grocers are aware of the fact that we stand back of the name, that if any product which we put out is not satisfactory in every way, it is taken back and the money refunded. It is of inestimable value in putting out new products.

In an average year the name Kellogg appears on packages, I think, in excess of one billion and a half; on the cartons only.

In advertising products under the name Kellogg the company has expended since it began advertising in 1905, in excess of fifty million dollars; the name Kellogg has appeared in every advertisement.

As to whether the Kellogg name under these circumstances has value as a sales element—it has very great value. Unless the consumer created a demand for the product through the advertising, the retail grocer would not be interested in stocking the goods.

The units of sale you ask about—the products are all sold in packages or cartons, as indicated by this exhibit. Some are individuals and some are family size.

To mark these cereal products, the Kellogg Shredded Wheat Biscuit, the Whole Wheat Biscuit, we introduced some years ago a glacine front, a cellophane front, which showed the biscuit very plainly, so that the consumers may know what they are buying. It is impossible to mark flakes.

None of the cereal products of the Kellogg Company, other than the whole wheat biscuit, are individually marked as to the product itself, when it is outside of the carton.

Kellogg's Whole Wheat Biscuit is a product made from the entire wheat. It is shredded and the shreds are very fine shreds. It is well baked and toasted, dark on top and bottom, and it is a small biscuit. That is the size (indicating) as compared to the other biscuit.

Nothing is added to its flavor, but the process produces a special flavor. This is done by dextrinizing more thoroughly the starch of the wheat.

As to whether the small dark biscuit of the defendant could be palmed off as the large biscuit of the plaintiff—in my opinion, one would be able to tell one biscuit from the other, when it is white on the bottom, slightly toasted on the top. The smaller biscuit is well toasted

on top and bottom, and the flavor, when eaten, is different.

(Offered in evidence and marked "Defendant's Exhibit No. 148-A to 148-H for Identification.")

The exhibit you show me marked Defendant's Exhibit No. 148-A to H, is the tear sheet from a magazine, *Literary Digest*, of Kellogg's Shredded Krumbles.

B is an advertisement of Kellogg's Shredded Krumbles, an advertisement from a magazine or newspaper, I am not sure which.

C is an individual carton of Kellogg's Shredded Krumbles. It is marked "Free Sample."

D is an advertisement of Kellogg's Shredded Krumbles taken from some magazine and I am unable to state which one.

E is proof sheet of a carton of Kellogg's Shredded Krumbles.

F is a magazine tear sheet in colors, advertising Kellogg's Shredded Krumbles showing a facsimile of a carton and a girl in colors.

G is the same thing as the preceding one, an advertisement of the Kellogg Shredded Krumbles.

H is an advertisement of Shredded Krumbles showing a boy and a facsimile carton.

I am unable to state the month these advertisements were run, but the copyright would indicate that they were not run before that date—1920.

They were run as advertisements of the defendant company.

(Received in evidence and marked "Defendant's Exhibit No. 148.")

The copyright date of 1920 and the package illustrated contains the words "Kellogg's Toasted Corn Flakes," which would fix the date between 1920 and 1922.

The carton marked for identification 149 is a carton of Kellogg's Krumbles, Shredded Whole Wheat, put out by the Kellogg Company.

THE COURT: Have crumbs and Krumbles anything to do with each other?

MR. CLARKE: I do not know. Mr. Kellogg might answer that question.

WITNESS: It is a shredded product.

MR. CLARKE:

Q. 106. It is in cracker or in biscuit form?

A. It is just in shreds.

THE COURT: A crumb would suggest Krumbles?

WITNESS: According to the name, it did. It is small Krumbles or shreds.

(Received in evidence and marked "Defendant's Exhibit No. 149.")

WITNESS: Package marked for identification as Defendant's Exhibit 150 is a package of Kellogg's Wheat Krumbles printed in the Kellogg colors, and it is whole wheat, shredded and toasted, and it is shown to be served in a dish, or the product is in a dish on the package on both sides.

A very large demand has been created by advertising for the products known as Kellogg's Whole Wheat Biscuit and Kellogg's Shredded Whole Wheat Biscuit.

(Package offered in evidence and marked "Defendant's Exhibit No. 150.")

CROSS-EXAMINATION.

WITNESS: I have been forty years directly and indirectly in the prepared food business. I was associated with Dr. J. H. Kellogg at Battle Creek, Mich.

with the State or Government. The fraternities and sororities, colleges and universities, are under the first classification.

The second classification, the State institutions, that is, institutions that are owned and controlled by the various States in the United States, including prisons, hospitals, State hospitals for the insane, sanitariums, homes for the aged, which are all controlled by the various States.

And the Government institutions which include the Department of the Interior, the Veterans' Administration, the United States Army, the Navy, and the Marine Corps, and all Government institutional outlets.

The Department of the Interior has Indian hospitals and schools, of which there are about seventy-two throughout the entire United States.

This institutional work as I have outlined it has a fairly large market for the Kellogg biscuit. It is a very special market and it is a market that we have tried to develop in a special way, because as a general rule it does not resell the Kellogg products.

I have been working at Battle Creek about five years, and I have been spending the majority of my time since I have been with Kellogg Company in the development of that particular type of business. I travel all over the United States in the development of the institutional restaurant.

The Kellogg Company, to my knowledge, is the only cereal company at the time I started in the development of institution sales that specialized in selling institutions.

For example, the Department of the Interior, up until three years ago, did not use any Kellogg's Whole Wheat Biscuits, or a wheat biscuit of any type.

Up until the time the Kellogg Company started such specialized work, for example, the Navy Department, in the latter part of 1928, made it possible for the

navy to use—ready-to-eat cereals, including a wheat cereal, such as Kellogg's Whole Wheat Biscuit.

Up to that time the navy has never approved the use of any ready-to-eat cereals for the use of the general service.

The Department of the Interior stated that if we could create a demand for such a product, that they would include it in their catalogue, include both Kellogg's Whole Wheat Biscuit and Kellogg's All Bran in their catalogue, which made it possible for the institutions to obtain those products in serving cereals to their inmates in the institutions. He gave his consent to our going ahead and supplying samples of our products to the various institutions, and told us if the institutions requisitioned the cereals, they would be placed on the catalogues and put out for competitive bidding, and at that time he asked me if there were any other competitive products on the market for both of the two items that we were interested in.

That was the Whole Wheat Biscuit and Kellogg's All Bran, and I, of course, told him there was a competitive product for both of them; the National Biscuit Company's Shredded Wheat and Posts Whole Bran. When I speak of him I mean the purchasing agent, W. B. Fry.

The way the business was handled within the Department of the Interior is that requisitions go into the purchasing department annually, and if they call for any such particular items, they are purchased on competitive bidding. Now, the institutions requisition the Kellogg products, and at that time Mr. Fry asked us regarding the way he should call for such products, so that it would be open to competitive bidding, and at that particular time we, of course, were anxious to get him to call for Kellogg's Whole Wheat. He says, "You will have to appreciate the fact that the Government

always wants competitive bidding on anything that they buy, and asked us to look over a particular clause that he had used in calling for this particular item."

I have here a copy of the bid which they just recently issued, showing the way they called for this particular product, in the very first year that they issued proposals, calling for bids for a wheat biscuit. This bid was opened on May 18th and is an annual bid. The document is our extra copy of request for a bid. It is the statement on Government form of bid marked groceries, samples not desired, directed to the purchasing officer, Room 144, Department of the Interior, Eighteenth and E Streets, Washington, D. C., and attached to it is a schedule, one of the paragraphs of which reads:

"56-G-590-1072. Case of biscuits, Whole Wheat, Shredded, to meet Federal Specification No. NC-191, as described, E-2H thereof. 24 12½ oz. packages and 36 12 oz. packages to type 1 or 2 carton; samples not desired. State price per pound."

Q. 30. Do I understand that that specification of what was desired to receive bids on, was prepared in any way in collaboration with you?

A. No, sir, he prepared it and asked us if our product would meet that specification.

WITNESS: Our product meets specification 24 12½ ounce packages. The product manufactured by National Biscuit Company meets the specifications of 36 12-ounce packages. I could not state definitely, but I rather imagine the product known as the Rippled Wheat would meet the specification, although that would be a matter of analysis. When it comes right down to it, the Rippled Wheat really would not meet that specification, I do not believe.

I know of only those two that would meet the specifications—plaintiff's product and Kellogg's product.

Yes, the Government mails this form to the Kellogg Company. To my knowledge they are mailed by the Government to cereal manufacturers at large.

When the bids are received by the Kellogg Company they are filled out just above the word "Biscuit, Whole Wheat, Shredded" on page 18—would fill in the name "Kellogg's Whole Wheat Biscuits, packed 24 12½-ounce packages to the case." I attended to this bid opening.

Q. 46. You filled in the price at which it was bought?

A. Yes.

WITNESS: That is a copy of our bid. It is a request for bids from the Department of the Interior. The bid went in as a duplicate of this, with the price added. I attended the bid opening. I heard all of the prices that were bid. The National Biscuit Company bid on that.

Q. 52. How was the product identified on plaintiff's bid?

A. It was identified as "Original" Shredded Wheat, using the word "Original."

(Received in evidence and marked "Defendant's Exhibit No. 141.")

WITNESS: I have several other samples of various types of bids. The Navy Department calls for cereals. These bids are the standard Government specification known as M-C-191, dated July 21, 1931. There is a specific specification for Shredded Wheat on the third page, paragraph E-2-H.

(Received in evidence and marked "Defendant's Exhibit No. 142.")

Witness: I have here a proposal calling for food requirements for the Naval Supply Depot at Norfolk, Va., for their commissary store. This is for resale in the commissary store, and calls for one item, No. 315, which item reads—"Item No. 315, 2400 packages wheat, shredded, Kellogg's, 12½ ounce packages, and Item No. 316, 400 packages wheat, shredded, N. B. C. 12 ounce packages."

Item No. 315 refers to Kellogg's because the printed name Kellogg's is referred to, for one thing, and the 12½-ounce size is the Kellogg's package, the weight of a Kellogg package.

Item 316, reading 400 Whole Wheat, Shredded, N. B. C., refers to National Biscuit Company's Shredded Wheat.

The procedure of the Kellogg Company was to fill in the standard form, No. 31, the first sheet indicating the name of the Kellogg Sales Company and address, and we have indicated under item No. 315 the name "Whole Wheat Biscuit." We typed that in. The printed name, Kellogg's, is, of course, in there, and I might add that in this particular instance they accepted the lowest bid on Kellogg's for item No. 315, and the lowest bid on National Biscuit Company's product for item No. 316. We did not bid on item No. 316, which is specified as the National Biscuit Company's product. Both those articles were ordered for resale in commissary stores. The bid as returned has certain prices marked opposite the item "Whole Wheat, Shredded, Kellogg's 12½ ounce." You simply filled in price for that one article. Opposite "Whole Wheat, Shredded, N. B. C." the price columns are blank.

(Offered in evidence and marked "Defendant's Exhibit No. 143.")

WITNESS: I have several others similar. Here is one from the Naval Supply Depot, calling for delivery to the Naval Hospital. The Naval Hospital has also specified a distinct brand name, and this calls for delivery both to the General Hospital and for the general service. The general service, of course, does not specify brand name, but for the hospital delivery, they call for "Wheat, Cereal, Kellogg's Whole Wheat Biscuit, one ounce packages." I might add here that the National Biscuit Company placed a bid on this particular item, which was specified "Kellogg's."

The Kellogg bid, "Wheat Cereal, Kellogg's Whole Wheat Biscuit, one ounce packages," was filled in and returned to the Naval Supply Department.

(Offered in evidence and marked "Defendant's Exhibit No. 144.")

FIFTH DAY.

May 26, 1933.

MR. COOPER: The next point is about the Plaintiff's Exhibits 254 to 260 inclusive, those being the certificates of incorporation of the Natural Food Company and the amendment of its charter, and so on, down through the title papers which I offered yesterday and the ruling of which was suspended pending an examination and consideration by the defendant's attorney. I understand that they have no objection.

MR. CLARKE: No objection.

THE COURT: Admitted.

(Received in evidence and marked respectively "Plaintiff's Exhibits Nos. 254 to 260.")

MR. COOPER: We would like the privilege of withdrawing these and substituting photostatic or other copy.

from the Navy purchasing officer at New York City on April 8th. The bid was opened April 18th. This proposal calls for cereals, ready to eat, to meet specification No. NC-191; calls for wheat, shredded, equal to paragraph E-2-H, Specification 191, in Bulk. That is in large size packages, and also wheat, shredded, equal to the Specification NC-191, paragraph E-2-H, in individual packages.

That specification referred to is the Government Federal Specification. We have placed our bid on Kellogg's as is indicated on this copy.

The word "Kellogg" in different type was not in the bid when it was received by me. I typed in after "Wheat, shredded—E-2-H" the word "Kellogg's". I then typed in the figures, giving the price at which we were bidding.

(Received in evidence and marked "Defendant's Exhibit No. 153.")

WITNESS: The proposal which has just been offered in evidence, called for food requirements to supply the Navy during the month of May, 1933, and I have here a price bulletin of provision contracts, issued from the Navy Purchasing Office at New York City, which is sent to all naval supply stations supplied out of the New York Purchasing Office. This shows the name of the contractor, the contractors' address and telephone number, so that the purchasing officer may place his orders against the contract which is entered into on the part of the contractor with the U. S. Navy. This particular price bulletin shows the Kellogg's Sales Company as having been the successful contractor for certain items, and it shows the National Biscuit Company as also having been a successful contractor for certain items.

Both of these items include either Whole Wheat Biscuits or National Shredded Wheat. The items

which are called for in large packages, or in bulk, are considered—or are given to the Kellogg Company, as indicated by the number which is assigned to the Kellogg Company—the number is 45,172. This represents the number by which the contractor is designated: On the first page it shows No. 45,172, as being the Kellogg Sales Company of New York City; 41,186 is the number for the National Biscuit Company. The National Biscuit Company was awarded the item of individual packages for wheat cereal, shredded, as indicated here as original; .1448 indicates the net price per pound. Number 41,186 is the number of National Biscuit Company. There are no other references regarding cereals.

(Received in evidence and marked "Defendant's Exhibit No. 154.")

WITNESS: This is really an accompanying letter from the Navy Purchasing Office, stating that the award for that particular item was made to the National Biscuit Company. The original memorandum received by Kellogg Sales Company follows notification number to the National Biscuit Company.

I have here a copy of a standard Government form of bid. It is a request for a bid, a copy of a request for a bid received from the Navy Purchasing Office at New York, calling for a delivery to their commissary store, such items being resold as resale items in the store.

Under Item No. 725 it calls for Wheat, Shredded, Kellogg's in 12½ ounce packages.

We have shown on the copy of our bid that we are bidding on Kellogg's Whole Wheat Biscuits, 12 ounce packages, 24 to the case, and the price.

The document as I received it described No. 725 Wheat, Shredded, Kellogg's 12½ ounce packages. It could not refer to any other product on the market. I might add in this particular instance, as is the case

with any commodities purchased by the Government for resale in the commissary stores, that when a brand name such as "Kellogg's" or "National" or "Niagara" is specified, the award goes to the lowest bidder on the brand name that is specified.

There could only be competition in bidding on the Kellogg item.

(Bid received in evidence and marked "Defendant's Exhibit No. 155.")

WITNESS: The next one is a standard Government form of bid, a request for a bid from the supply officer, Naval Air Station, Lakehurst, New Jersey. This calls for delivery to their commissary store and calls for under Item No. 143, Whole Wheat Biscuits, Kellogg's, twenty-four 12½ ounce packages. We have filled in the name Kellogg's Whole Wheat Biscuits on this, indicating the produce we are bidding on. This word "Kellogg" was on there when it came to us. The whole line reads "143 Whole Wheat Biscuit, Kellogg's," that is the way it came originally, and I added on the same line "Whole Wheat" and on the next line below that "Biscuits, twenty-four 12½ ounce packages, Kellogg's," was added to the bid. Both the proposal and the bid have the name "Kellogg's." I added the name Kellogg to the bid and it was right on the proposal when received by us.

One of these requests was for bids of an article specified by brand names for resale in a commissary store. Whenever they call for bids for the general service, they simply call for the type, that is, wheat cereal or corn cereal, and refer to the specification. There is no reference in this proposal, as it was received by us, for the Federal proposal of cereals.

(Received in evidence and marked "Defendant's Exhibit No. 156.")

WITNESS: Here is a proposal calling for bids from the Quartermaster, Selfridge Field, Michigan. This proposal calls for Item No. 57, "Cereal Breakfast, 12 ounce package, National Shredded Wheat."

Under Army purchases, cereals are classed as resale items, or as sales items. They are not issue items.

Kellogg Company has bid on that in the past, but we have since ceased bidding, because the name "National" is specified and regardless of whether our price would be lower, the name of the National Biscuit Company is always accepted.

(Received in evidence and marked "Defendant's Exhibit No. 157.")

WITNESS: I have here a proposal calling for bids from the Quartermaster at West Point, New York. Under Item No. 42, they call for Cereal Shredded Wheat Biscuit, 12 ounce package, National Biscuit Company. We have ceased bidding on this because the business always is awarded to the National Biscuit Company because it is their brand that they desire for resale purposes.

(Received in evidence and marked "Defendant's Exhibit No. 158.")

WITNESS: If we were awarded the item we would have to go to the market and buy National Shredded Wheat.

This is a letter received from the Quartermaster at West Point answering an inquiry of ours which we had made in regard to an item specified as National Shredded Wheat.

I have here a standard Government proposal calling for bids for the Veterans Administration Home, National Military Home, California. Item No. 14 calls for Whole Wheat Biscuit shredded, fresh, and marketable in every respect in individual packages. We bid

on that and it was awarded to the Kellogg Company. Samples were submitted in connection with that bid.

(Received in evidence and marked "Defendant's Exhibit No. 159.")

WITNESS: This is a proposal for bids received from the Veterans Administration at Washington, D. C., calling for various ready-to-eat cereals, and under Item No. 1-0 for delivery f. o. b. Perryville, Maryland, calls for Shredded Wheat, twenty-four 12 ounce packages to the case. Item No. 1-P Shredded Wheat, 60 packages to the case, either 1½ ounce or 2 ounce packages, meaning the individual packages.

This invitation to bid calls for "E-8 Shredded Wheat shall be prepared from sound clean wheat without material removal of the bran; shall be processed with or without added flavoring, drawn into fine shreds, formed and baked in oblong biscuits of uniform size and shape, weighing approximately one ounce each, shall be porous, tender, crisp and of excellent flavor, free from rancid, musty or other undesirable taste or odor, shall contain no dirt, grit or other extraneous matter."

(Received in evidence and marked "Defendant's Exhibit No. 160.")

WITNESS: The next one is from the U. S. Marine Hospital in St. Louis, calling for Item 108, "Wheat, shredded, 24 to the case, 12½ ounce." The word "Keilogg" was typed in. We bid on that and sample was submitted.

(Received in evidence and marked "Defendant's Exhibit No. 161.")

WITNESS: This is from the purchasing and contracting officer, Fort Benjamin Harrison, Indiana, and another Item No. 31 calls for Whole Wheat biscuit, 12½ ounce, Kellogg's. We typed in the words "Kel-

Kellogg's Wheat Biscuit 12½ ounce, Kellogg's 360 packages, .0838," and submitted a bid.

(Received in evidence and marked "Defendant's Exhibit No. 161.")

WITNESS: This is from the purchasing and contracting officer, Fort Benjamin Harrison, Indiana, and another Item No. 31 calls for Whole Wheat biscuit, 12½ ounce, Kellogg's. We typed in the words "Kellogg's Wh. Wh. Biscuit, shredded (24-12½ ounce pkg) Whole Wheat biscuit, 12½ ounce Kellogg's, 360 packages, .0838," and submitted a bid.

(Received in evidence and marked "Defendant's Exhibit No. 162.")

WITNESS: I have here a proposal from the Quartermaster at Port Hoyle, Maryland, under Item No. 26, calls for Shredded Wheat, Kellogg's, 12½ ounce package.

(Received in evidence and marked "Defendant's Exhibit No. 163.")

WITNESS: Here is one from the U. S. Property of Disbursing Officer, State of New Jersey, Trenton, New Jersey, under Item No. 5, Whole Wheat Biscuits, Kellogg's, one-half ounce package, 60 packages to the case.

(Received in evidence and marked "Defendant's Exhibit No. 164.")

WITNESS: Another one from the Quartermaster of the Army War College at Washington, D. C., under Item No. 102, calling for cereal, Whole Wheat Biscuit, Kellogg's 12½ ounce packages. That is for resale purposes. The Army War College maintains a college store.

(Received in evidence and marked "Defendant's Exhibit No. 165.")

WITNESS: One from the contracting officer at Fort Moultrie, South Carolina, calling for Item No. 14, cereal breakfast, Shredded Wheat biscuits, Kellogg's.

(Received in evidence and marked "Defendant's Exhibit No. 166.")

WITNESS: That is for resale in the commissary store. The purchasing and contract officer at Langley Field, Virginia, under Item No. 43, Shredded Wheat, 12½ ounce Kellogg's.

(Received in evidence and marked "Defendant's Exhibit No. 167.")

WITNESS: Here is one from the Quartermaster at Fort Crook, Nebraska, under Item No. 14, Wheat, Shredded, 12½ ounce, Kellogg's.

(Received in evidence and marked "Defendant's Exhibit No. 168.")

WITNESS: Here is one from the purchasing and contracting officer at Fort McClellan, Alabama, under Item No. 39, Shredded Wheat Biscuit, Kellogg's.

(Received in evidence and marked "Defendant's Exhibit No. 169.")

WITNESS: Here is one from the Quartermaster supply officer, San Francisco General Depot, Fort Mason, San Francisco, California, under Item No. 235, Shredded Wheat, large package, for Fort Winfield Scott, Kellogg's.

The specification number is indicated where there is no brand specified. As you will note, the brand is specified opposite each item, where the brand is desired, where the specification is desired. Where there is no brand, where the name Kellogg does not appear, Specification NC-191.

(Received in evidence and marked "Defendant's Exhibit No. 170.")

WITNESS: Referring now to 171, all of these had the name Kellogg as they came to us, put in by the department.

(Received in evidence and marked "Defendant's Exhibit No. 171.")

WITNESS: This is from the Quartermaster supply officer at Brooklyn, N. Y., calling for delivery at—this is the contracting officer, but it calls for a delivery to be made to the Quartermaster, Port San Juan, Porto Rico. This calls for Item No. 171, cereal breakfast food, Whole Wheat Biscuit, 12½ ounce, wax wrapped packages, Kellogg.

(Received in evidence and marked "Defendant's Exhibit No. 172.")

WITNESS: This is an informal contract received from the Marine Corps, calling for delivery to the Marine Corps, Marine Barracks, Navy Yard, Washington, D. C., and to the Marine Barracks, Naval Ammunition Depot, Dover, New Jersey, under Item No. 45. It calls for delivery to Washington, D. C. It calls for Shredded Wheat, 12½ ounce packages, to be Kellogg's Whole Wheat Biscuit. That is our order. That is the contract that they sent to us after we had placed the bid. The language "48 packages Shredded Wheat, 12½ ounce packages to be Kellogg's Whole Wheat Biscuits per package NC191" was in the order when it came to us.

It is subsistence, and that is why the specifications NC191 was indicated on there; when the proposal came to us, we indicated just Shredded Wheat and specification No. 191. This is the contract. There is another one here calling for delivery to the Naval Ammunition Depot at Dover, New Jersey, on the same sheet. It is also item No. 45, specified forty-eight packages Shredded Wheat 12½-ounce packages to be Kellogg's Whole Wheat Biscuit per package NC191.

Dr. J. H. Kellogg was the head of the Battle Creek Sanitarium at the time of my entry into the Kellogg Company forty years ago, but not at the present time. He was the first Kellogg, so far as I know, in the breakfast food or cereal food business. I remained in association with him in the breakfast food business somewhere between ten and twelve years.

The manufacture and distribution of the foods of the Battle Creek Sanitarium was handled by others. I had something to do with it—I was working for the Battle Creek Sanitarium in a business capacity; was there during those 25 years in all and I was in charge of certain matters pertaining to the food business, but not the selling or distribution. I had something to do with the foods—in preparing them and in suggesting experiments carried on. I did not have much to do with the sale.

Dr. J. H. Kellogg was well known as a physician and the food business developed later. It was developed in a small way—the food business—during that period.

There was a Mr. Brown who was president, I think, less than two years. No, I have to correct that statement—my son was president of the company.

My son was president for two years and Brown was president for a matter of somewhat less than two years.

The carton which you have marked for identification (Plaintiff's Exhibit 261) which you state from information given you was purchased at a store at Kenosha, Wisconsin, known as Bernson's Grocery, on December 24, 1932, appears to be one of my company's products of the character described as Kellogg's Whole Wheat Biscuit.

(The same was marked "Plaintiff's Exhibit 261 for Identification.")

WITNESS: The top layer of the biscuits inside that carton do not seem to be as much browned on one side as the other, but one side is quite distinctly paler than the other. The one that you picked from the next lower layer is just about the same as the first one that you showed me. It might occur that our biscuits do come through a little more brown, as noticeably more brown on one side than the other. The present biscuit, I think, are well browned that you found on the marked day—I think are well browned and that is an old package, some years ago. No, I cannot tell from the character of the package about its vintage.

The package which is Plaintiff's Exhibit 261 for identification is quite similar to Plaintiff's Exhibit 4 to the interrogatories. I have no recollection as to the dates of these packages, or the forms, except what you tell me. There was no time when we baked differently on the two sides—it might have been an error in baking. I am not sufficiently in touch with the daily output to know whether or not biscuits differently browned on the two sides are a part of the regular output of the company, but I have an explanation to make. The instructions were to brown them on both sides, and they are uniformly browned, occasionally they are not.

(Received in evidence and marked "Defendant's Exhibit No. 132.")

WITNESS: Among our advertised products at one time and another there was a cereal substitute for coffee known as Drinket; that was advertised under the Kellogg name. Yes, I see on Defendant's Exhibit 148, an advertisement of Drinket. I cannot state what length of time it was advertised among the Kellogg line; also I cannot state when it ceased to be put out. I have no recollection of the date. We did withdraw it from the market, but it was sold in a small

way for some years after 1920 perhaps, and finally it stopped selling.

There was another product called Wheat Flakes which we manufactured. It was withdrawn after a time for a better product that came later. Corneoka was brought out during the war time as a substitute for other products not obtainable, and when the war ceased we discontinued the product. It was not advertised very extensively.

This was tapioca corn, but the Government asked us to refrain from using the name tapioca and we discontinued. About the early Wheat Biscuit, which was begun about 1910 and continued until the war time, we had by reason of Government requirements to mix in corn and rye with the wheat. We may have changed our names, but I have no definite recollection. I do not recall advertising that we no longer were making a wheat biscuit. It was a fact, however, that we did substitute other grains for wheat.

In the manufacture from the beginning of 1910, we made a dough in which there was some flavoring matter in addition to the wheat itself—sugar and salt and malt.

The advertisement showing a picture of child or young lady eating it as a cracker says nothing about eating it as a cracker, but it was eaten as a bread or a substitute for bread, eaten as a cereal, principally as a cereal in a bowl, the same as other cereals. I do not recall the exact words "eaten as a cracker." We issued a great many advertising circulars, booklets, and I am unable to remember the text of all of them. The young lady shown in Defendant's Exhibit 145 was eating the biscuit—shows very plainly. The Krumbles shown in Defendant's Exhibit 130 is fairly shown in the dish, but not absolutely.

In regard to Krumbles the wheat is cooked, shredded in flat shreds, not round shreds. There are

some broken off in the packing of the product. It has been called "ribbons" and the package called Krumbles. Flavor is added. No, I would not say it was sweet. It is slightly sweetened, but not materially sweetened. There is other flavoring added besides the sugar and that flavoring is added before the final cooking of the material. Whatever flavor is added, is added to the material which is shredded. After shredding it is baked in an oven until it is crisp. I am not sure that Defendant's Exhibit 150 is the only one which my company markets at the present time—Wheat Krumbles. There may be another package.

(Same was marked "Plaintiff's Exhibit G for Identification.")

WITNESS: I recognize that as a carton put out by my company. It is in the same colors that we use on all of our packages. It was used for marketing Kellogg's Shredded Wheat Krumbles, some time ago. The date I could not state.

The carton was made in Canada, packed in Canada, sold in Canada, by another company.

I could not say that we did not use such a package as this for Krumbles. I think we probably did. In the United States, yes.

The company controls the Kellogg Company of Canada.

The contents of this package is quite similar to the contents of Defendant's Exhibit 150.

That is correct \$50,000,000 has been expended by the Kellogg Company to build up its line of cereal products.

RE-DIRECT EXAMINATION.

WITNESS: My brother, Dr. John H. Kellogg, was a very large stockholder in the Kellogg Toasted Corn Flake Company, for several years. Then he engaged in competitive business and sold his stock in the Kel-

logg Toasted Corn Flake Company. I purchased nearly all of his holdings. I am owner of 60 per cent. of the Kellogg Company stock.

Drinkel was a very small seller. It was put out experimentally and improved and doctored and various things happened, and it was finally allowed to dwindle, no push was put back of it, and another product was put in its place.

The name Kellogg on the package will secure distribution for the product very quickly with the grocers and grocer trade, both the retail and the wholesale trade. Consumer advertising and effort, window dressing and newspaper advertising, billboards, are usually found necessary to produce a consumer demand for the product. I think the name Kellogg will induce consumers to give the product a trial in the beginning. It will be helpful. Many people will buy a product with the name Kellogg on it but whether it would be a continued repeat business, it is difficult to state unless it was advertised in addition to being on the shelves.

Unless the product repeats it is not a success. It must repeat in order to make it profitable. I could not say that I have ever marketed any products, which, after they were tried by the public, by being displayed on grocers stands and windows, were found not to be repeating sellers—I do not recall any.

The package that you hand me is a package of Kellogg Wheat Krumbles, whole wheat, shredded and toasted, put out by the Kellogg Company of Battle Creek, Michigan.

(Received and marked "Defendant's Exhibit No. 151 for Identification.")

WITNESS: I think the figure of fifty million dollars is straight advertising and sampling. I do not think it includes the store and window work that has

been done which amounts to a very considerable sum. As to window work coming under some bookkeeping systems as advertising, there will be people here who will be competent to answer that. I can not.

RE-CROSS-EXAMINATION.

The particular package (Exhibit 151 for Identification) marked with the Battle Creek is sold in the United States only, and abroad, I think perhaps a small sale abroad; not including Canada.

The Canadian Company has a very similar package with a different imprint. In London, Ontario, instead of Battle Creek, Michigan. The colors are the same. So far as I am aware the lettering otherwise is the same.

I could not state the date when this package, Exhibit 151—I mean that type of package—was put on the market, but there are people here who can.

As to products found not to be repeat sellers—I cannot answer that directly. I think we have never put out a product, but what has repeated to some extent, but whether it repeated in a satisfactory manner would be another question. I do not think we ever put out a product, but what it did have some repeat, but whether it repeated satisfactorily so it became profitable, is another matter. There were several that were not satisfactory from a profit standpoint.

(Bid Naval Supply Depot of Norfolk, Va., May 3, 1933, received in evidence and marked "Defendant's Exhibit No. 152.")

HAROLD F. MUNTZ, recalled.

DIRECT EXAMINATION (continued).

I am still dealing with Navy Department proposals and bids. I have here the bidders' file copy, which is our file copy of a bid we placed on a proposal

Item No. 6 for the Illinois School for the Deaf, eight cases of biscuits, Whole Wheat, 12 ounce packages.

Item No. 6 for the East Moline State Hospital, five cases of biscuits, Whole Wheat.

Item No. 6 for the Elgin State Hospital, four cases of biscuits, Shredded Wheat.

Under Item No. 6 for the Illinois Eye & Ear Infirmary, one case biscuits, Whole Wheat, 1½ ounce package, individual size.

For the Soldiers and Sailors' Children's School, Item No. 6, 15 cases biscuits, Whole Wheat.

For the State Reformatory for Women, Item No. 6-A, these cases biscuits, Whole Wheat, individual size.

And this last paragraph here on the bid calls for samples. Do you wish me to read that?

On all items requiring samples which are submitted by parcel post, bidders must include sufficient postage stamps for return of said samples. They request samples, however, on the second page, where it states that two samples of each item must accompany bid, except in the case of Items Nos. 12, 13, 17, 18 and 20. On this proposal Item No. 6 is the biscuit, Whole Wheat, and we were required to submit samples.

(Received in evidence and marked "Defendant's Exhibit No. 184.")

WITNESS: We always submit our samples in our regular packages, like this package, when the large sized packages are called for. When the small individual size is called for, we furnish the small individual size package.

(Received in evidence and marked "Defendant's Exhibit No. 185.")

WITNESS: We have never had any goods rejected as not being ordered by the various departments. I do

not see how that could happen because in every instance, we always indicate that we are bidding on Kellogg's Whole Wheat Biscuit, and submit samples to show the product that we are bidding, whenever samples are specifically requested, which is most generally the rule.

The samples submitted are always in the regular Kellogg cartons; bearing the name Kellogg's on every side is the standard practice.

We have submitted here proposals showing instances where the plaintiff here, National Biscuit Company, has put on proposals specifying the product to be bid on as Kellogg's.

We have bids of National Biscuit Company in which that product was bid as "Original" Shredded Wheat.

Many dietitians and stewards in institutions prefer the small size biscuit, because there is absolutely no waste to that size. For that reason they specify in ordering the small size biscuit.

By the small size biscuit I mean the Kellogg Whole Wheat Biscuit, and the stewards and dietitians know that is the Kellogg Whole Wheat Biscuit.

In some instances they specify the larger biscuit of National Biscuit Company. As a general rule we have found the dietitians and stewards seem to prefer the small sizes.

Yes, I have something to do with the servicing of restaurants and hotels with Kellogg's Whole Wheat Biscuit. The Kellogg's Whole Wheat Biscuits in the individual packages are distributed to the wholesale grocers, and we have Kellogg salesmen call on restaurants and hotels all over the country to show our package to the restaurants and hotels, and to tell them what we are doing, to create a demand for that product, and to try to get them to handle Kellogg's Whole Wheat Biscuits.

We furnish the restaurants with advertising material relating to Kellogg's Whole Wheat Biscuit. I have here a little restaurant display that was developed very early in 1928, which shows—may I have an individual package to show just how this is displayed. The individual package is displayed in this manner, and very beautifully shows up the Kellogg's Whole Wheat Biscuit package itself and two biscuits in the bowl, showing the two small biscuits and the language that they do fit so well in the cereal bowl.

Restaurants use the displays of the Kellogg product. We have distributed thousands of them around the country. In addition to that, I might mention that we also furnish restaurants and hotels with a menu slip. It also—that is the menu sheets, as well as the menu slips that shows the Kellogg Whole Wheat Biscuit. The menu sheets themselves I do not have with me, nor the menu slips. We furnish these menu slips without charge and they refer to the Kellogg product as "Kellogg Whole Wheat Biscuit. We have distributed many of these menu slips. Those who have their own menu cards, we always ask them to list Kellogg's Whole Wheat Biscuits on their menus, and that is a very general practice of all the Kellogg salesmen.

We have been successful in inducing hotels to list the product as Kellogg's Whole Wheat Biscuit on their menus, as can be shown in two menus that I have here. One is from a railroad, the Chicago, Milwaukee, St. Paul & Pacific, showing Kellogg's Whole Wheat Biscuit as one item, and Shredded Wheat as another.

(Received in evidence and marked "Defendant's Exhibit No. 187.")

Witness: Here is one from the Fort Shelby Hotel in Detroit. It calls for Kellogg's Shredded Whole Wheat Biscuits for one item and Shredded Wheat for the other.

(Received in evidence and marked "Defendant's Exhibit No. 188.")

WITNESS: On the Kellogg's Whole Wheat Biscuits approximately 2 per cent. of the total sales of the Whole Wheat Biscuit are sold in the individual packages. Approximately, and as near as I can estimate, 98 or 99 per cent. of our biscuits sold to restaurants are in the individual packages. There is really only a very minute quantity sold to the restaurants and hotels in the large sized packages.

In my travels about the country on this restaurant and hotel business I have never seen a glass globe the size of Plaintiff's Exhibit 36. I have a smaller one, but it has been quite a long time ago. I do not believe I have seen more than eight or ten of them at the very most.

In my work with the Kellogg salesmen, I call on restaurants and I have called on literally thousands of restaurants since I have been working for the Kellogg Company. I do not believe I have seen more than eight or ten of them in that period of time.

CROSS-EXAMINATION.

WITNESS: I am now 28 years of age and have been with the Kellogg Company a little over six years. I started with the company when I was 22 years of age. That was my first experience in the cereal food business. Before that I had sold groceries in a grocery store, but not for more than two or three days. I have been in the meat business and in the furniture business. I went to school at the University of Illinois. I worked for the Kellogg Company while I was in school. I called on fraternities and sororities at the University of Illinois. At that time I was on a salary. That period is included in the six years I worked for the Kellogg Company.

WITNESS: I first went to Battle Creek in August, 1928. Prior to that I had been at the University of Illinois until March, 1928, at which time my finances were in such shape that it was necessary for me to quit school, so in August, 1928, I became permanently established at Battle Creek with the Kellogg Company. Since that time my employment with them has been continuous. When I first started with them I was in charge of institutional sales directly under the supervision of the general sales manager. There was one man who preceded me, but he was in the department a very short time, as I recall the dates, from March until August. It was a comparatively new department. I took charge of it within four months of its establishment. After a short stay at Battle Creek I started traveling and that has been my occupation since that time.

My time was well divided between institutional selling and visiting restaurants and hotels, with possibly the exception of the first few months I was at Battle Creek at which time I spent a majority of my time on institutional selling.

At that time we were selling some of our products to institutions, but as I recall the figures, the volume was not any very great volume. It was a worth-while business for the company, however, I would imagine. The present volume I would say is a very worth-while volume.

There are three distinct classes over which my jurisdiction extends—the first takes in private institutions such as private sanitaria, orphanages and the like—and hospitals and city jails I would class under that, city institutions. I have always been in the habit of classifying them under those three groups and including city institutions under the privately owned group. The second group are institutions that are owned by the various States. The Federal Government is in-

cluded in a separate classification—the Army bases, Naval bases, and the like, are classified as the third class. Fraternities are under the private colleges and schools and universities.

In the first class, described as private institutions, I met competitive bidding. The purchases of private institutions are always purchased on competition. They ask for prices from the wholesale grocers or they will call a wholesale grocer on the telephone and ask for various prices. Some private institutions do issue proposals, but I would say as far as those who would actually ask for bids on paper, they are very few.

Classes two, consisting of State institutions, and three, consisting of United States Government institutions, may not be wholly distinguished from the first class by the fact that they are required to or do call publicly for bids upon a competitive basis, because many city purchasing departments handle the purchasing for the city hospitals, the city prison and the State sanitariums and the like.

Hotels are not included under the classification of institutions—they are included under the classification of restaurants and hotels. That is entirely apart from the institution business.

The Government and particularly some States buy without competitive bidding; at times.

Institutions buy other competitive products as well as the Kellogg products, and have for many years.

In reference to the Kellogg Company specializing exclusively in institution work, I mean that the Kellogg Company, to my knowledge, was the only cereal company that went in to develop the institutional business in a very specialized way, which is necessary in the development of that particular market.

As to the Shredded Wheat Company selling its cereal products to all these institutions, I know that after I started to work at Battle Creek, that for quite

some time the Kellogg Company was the only cereal company calling on the greatest majority of the institutions in the United States. Prior to the time I took over the work I never saw any specifications or invitations for bidding from institutions—I do not know what they contained.

The Kellogg Whole Wheat Biscuit competes directly in these institutions with Shredded Wheat—the two items are in competition with each other.

When interviewing Mr. Fry of the Department of the Interior he asked me to name a competitive product and I told him the product manufactured by the Shredded Wheat Company; that was early in 1930. The Navy Department until 1928 had never permitted the purchase of cereals for general service—that is to be served to the men on board ship. It did, however, permit their purchase for commissary stores for resale.

I would not say that the change in the specifications for the service was due to my efforts. I was very much surprised to see the specifications—they were mailed to us one day from Washington, D. C.

The first time I called on Mr. Fry was in 1928. The real purpose of my visit at that time was to become acquainted with Mr. Fry, and to talk to him about all of the Kellogg products. It was not until 1930 that we knew sufficiently about the manner in which that business was handled, to ask him to include any additional cereals other than the cereals they were purchasing at that particular time. They were purchasing corn flakes, bran flakes, wheat krumbles and the rice. We started to bid on them. I could not say it was in 1928, because my first experience with the Kellogg business at Battle Creek was in 1928, and that proposal comes out early in the year, each year, and it was in 1929—the early part of 1929, that I made out the first proposal for bids for the Department of the Interior.

I interviewed Mr. Fry, as I recall it, early in 1930, and at that time we showed Mr. Fry two products that we were interested in getting the Department of the Interior to use, Kellogg's All-Bran and Kellogg's Whole Wheat Biscuit. It was necessary for us at that time to take the two packages that we were trying to sell them, to the dietitian for the Department of the Interior, and ask her regarding them. They purchased all of their cereals annually on bids, and at the time I went into Battle Creek, they had not called for Whole Wheat Biscuits or Shredded Wheat on the bids. In calling on the institutions we found out, of course, they were not using Shredded Wheat, because they could not get it through the regular source of supply, and many of the dietitians in the institutions were interested in having a greater variety of cereals, and that is the reason that we approached Mr. Fry regarding the two Kellogg products I have mentioned.

Mr. Fry at that time asked the names of other competitive products and I mentioned the product manufactured by Shredded Wheat Company. It was considered that Kellogg's Whole Wheat Biscuits were in competition with that product at that time.

I did not mention Muffets as a competing product, as it cannot be considered up to the Federal qualification for a Shredded Wheat. The specifications stated it shall be drawn into fine shreds and Muffets is the ribbon shape. Muffets have never been bid. I imagine if they were in competition, Muffets would have been bid on for Shredded Wheat as called for, and it states oblong biscuits.

No, I did not assist Mr. Fry in preparing the specifications he got out. We talked to Mr. Fry early in the year regarding our two products, and it was necessary for us to create a demand in the institutions for that particular product, before he would even consider adding it. The dietitian approved the use of the two prod-

(Received in evidence and marked "Defendant's Exhibit No. 173.")

WITNESS: That is the way we received the order from the Government after we had placed our bid. I have here the bid itself from the Marine Corps. The proposal is not here. I just brought that along to show how the order is received. The proposal would be in our branch office files, and could be produced. This is from the Commonwealth of Pennsylvania for the Pennsylvania Department of Health Tuberculosis Sanitarium No. 2 at Cresson, Pennsylvania, and calls for twenty cases Whole Wheat Biscuits, Kellogg.

(Received in evidence and marked "Defendant's Exhibit No. 174.")

WITNESS: In connection with the last proposal that was offered as evidence, this is the State specification from the Commonwealth of Pennsylvania for cereal breakfast foods, and under type, under the second paragraph B, type, grade and size, the item is listed as Whole Wheat Biscuit and in brackets, "shredded" in cartons 12-ounce weight in cartons 12½-ounce net weight.

That means either 12-ounce net weight or the 12½-ounce. On page No. 4, paragraph G, they give their specification for Whole Wheat Biscuits Shredded.

Paragraph G: "Whole Wheat Biscuits Shredded, shall be prepared from sound, clean wheat, without material removal of the bran, shall be processed with or without added flavoring, drawn into fine shreds, formed and baked in oblong biscuits, of uniform size and shape, weighing approximately 1 to 1.2 ounces, shall be porous, tender, crisp and of excellent flavor, free from rancid, musty or other undesirable taste or odor, shall contain no dirt, grit or other extraneous matter."

That is from the Commonwealth of Pennsylvania. The biscuit of both the plaintiff and defendant meet those specifications.

(Received in evidence and marked "Defendant's Exhibit No. 175.")

WITNESS: I have here a proposal from the State of South Dakota together with a sheet from their specification book. The sheet from the specification book shows one paragraph headed "Shredded Wheat, 12 ounce package, 3 dozen to case," and item No. 1880 Niagara. Item No. 1880½ Kellogg's. That is the extent of the specification. That is a sheet from their specification book.

There is a reference here on page 1 of the proposal for bids, Item No. 11 calls for three cases of No. 1880½ Shredded Wheat, one-half dozen to the case, and the Item No. 1880½ refers to the Kellogg number on the specification sheet. Reading under Shredded Wheat, 12 ounce packages, 3 dozen to the case Niagara is No. 1880, and 1880½ is Kellogg's.

(Received in evidence and marked "Defendant's Exhibit No. 176.")

WITNESS: There is a reference back here, there is one which calls for Item No. 1880, 36 package Shredded Wheat, and the No. 1880 is the Niagara.

I have here a request for bids from the Bureau of Purchases, State House, Augusta, Maine. This calls for Item No. 2 Kellogg's Whole Wheat Biscuit No. 324, 24—12½ ounce, and under that "or equal".

Item No. 9, one case Kellogg's Whole Wheat Biscuit No. 324, which is the number for the Kellogg product, and in brackets, 24—12½ ounce packages or equal. There are several of these items that are just identical to the first two that I have read. If you wish me to read all of them, I will.

Item No. 21, 10 cases Kellogg's Whole Wheat Biscuit, No. 324, 24— $12\frac{1}{2}$ ounce or equal.

Item 130, 10 cases Kellogg's Whole Wheat Biscuit No. 324, 24— $12\frac{1}{2}$ ounces or equal. Here is one more that I notice, No. 37, 2 cases Kellogg's Whole Wheat Biscuit No. 324, 24— $12\frac{1}{2}$ ounce or equal.

(Received in evidence and marked "Defendant's Exhibit No. 177.")

WITNESS: Here is a proposal for furnishing supplies to the Rockland State Hospital at Orangeburg, New York; it calls for Item No. 20 Whole Wheat Biscuits, Kellogg's 24— $12\frac{1}{2}$ ounce packages to the case.

(Received in evidence and marked "Defendant's Exhibit No. 178.")

WITNESS: And here is one from the State of Tennessee under Item No. 3 for delivery to the Central State Hospital at Nashville, 6 cases Whole Wheat Biscuits, Kellogg's 12 $\frac{1}{2}$ ounce 24s, and they asked for the price per dozen.

Under Item No. 41, for delivery to the Tennessee School for the Deaf at Knoxville, one case Kellogg's Whole Wheat Biscuits. I believe that is all in here.

No, here is Item No. 21 for delivery to the Tennessee Vocational School for Girls, one case Shredded Wheat Biscuit.

(Received in evidence and marked "Defendant's Exhibit No. 179.")

WITNESS: I have here a group of orders received by our Syracuse, New York, office from various State institutions in New York. They call for—the first one calls for delivery to the Wassaic State School, Wassaic, New York, Item No. 33, Wheat Biscuits, Kellogg's, 24— $12\frac{1}{2}$ ounce packages to the case, 15 biscuits in the package.

(Received in evidence and marked "Defendant's Exhibit No. 180.")

WITNESS: These came all addressed to the Kellogg's Sales Company at our Syracuse office. These are actual shipping orders.

This is the Newark State School, Newark, New York, calls for Item No. 24, Whole Wheat Biscuits, Kellogg's 24, 12½ ounce packages.

(Received in evidence and marked "Defendant's Exhibit No. 181.")

WITNESS: This is from the Great Meadow Prisons, Comstock, New York, calling for Kellogg's Whole Wheat Biscuit, No. 360, individual size.

(Received in evidence and marked "Defendant's Exhibit No. 182.")

WITNESS: And this is from the Willard State Hospital, Willard, New York, Item No. 16, Kellogg's Whole Wheat Biscuits, 24 packages to case.

(Received in evidence and marked "Defendant's Exhibit No. 183.")

WITNESS: This is a proposal for bids from the State of Illinois, from the Division of Purchases and Supplies, the State House, Springfield, Illinois, showing their specifications and their quantities for various deliveries to the institutions requesting bids.

Under their specifications, Item No. 6, they show biscuits, Whole Wheat, 12½ ounce packages, bidder to state number of packages in case. For the Illinois School for the Blind, Item No. 6, eight cases Whole Wheat Biscuits, 12½ ounce packages, 24 to case.

From the Chicago State Hospital, Item No. 6—Item No. 6, by the way, refers to their specifications—five cases Whole Wheat Biscuits.

ucts, but it was necessary for us to call on the institutions, and to send samples of our products, before they would even call for the two particular products that we were trying to sell.

The institutions under the Department of the Interior send in requisitions annually for their requirements, and when the requisitions came along calling for Whole Wheat Biscuits, as a result of our calls and submitting samples, Mr. Fry then drew up a specification, and at the time we called on him, he asked us if our product, and the product made by the Shredded Wheat Company, would comply with that specification.

Rippled Wheat really would not meet that specification. It has never been bid where Shredded Wheat is called for. I believe Rippled Wheat has been on the market at least eight months. I am not certain regarding that. Rippled Wheat is a ribboned wheat, and inasmuch as the specification reads: "Shall be drawn into fine shreds and in oblong biscuits," it would not meet the specification.

In regard to specifications being drawn with reference to both products, I might explain that by using an example, if I may. For example, where Shredded Wheat is called for by the Government, and we bid on Kellogg's Whole Wheat Biscuits, as we always show on our bids, if our bid is low, we receive an award just as in the case of where Corn Flakes are called for on the specifications, where Corn Flakes are called for by the Government without a brand name, the product or award is made to the lowest bidder on any brand of Corn Flakes. Both products will meet the Federal specification and each one will claim the Federal specification.

When the proposal calls for Shredded Wheat we do not change the proposal. We simply show that we are bidding on Kellogg's Whole Wheat Biscuits just exactly as when we bid on Corn Flakes. We say Kel-

logg's Corn Flakes. We indicate Kellogg's Whole Wheat Biscuits. There can not be anything added to the proposal itself, because that is made up on a mimeograph form, that is already made up. We show on bids that we indicate that we are bidding on Kellogg's Whole Wheat Biscuits.

When we received a proposal calling for Shredded Wheat, we always fill in the preliminary form indicating that the Kellogg Sales Company is placing the bid and for the item Shredded Wheat, frequently above that we fill in the name Kellogg's Whole Wheat Biscuits, 24—12½ ounce package to the case, if it is the large size package.

THE COURT: Then you do alter the offer of the Government by adding something to it.

WITNESS: We indicate what we are bidding on, and that is general practice in all bidding for the various bidders to show what they are bidding in. We show that we are bidding on Kellogg's Whole Wheat Biscuits.

THE COURT: Would the terms of the contract not be understood unless you changed the wording of the Government offer?

WITNESS: I do not believe I understand your question.

THE COURT: The bid is the offer?

WITNESS: Yes.

THE COURT: The proposal is a general specification of the subject matter of a contract?

WITNESS: Yes, just exactly like when they call for—

THE COURT: You make an offer, and not the Government.

WITNESS: Yes, we make the offer.

WITNESS: Yes, I know Mr. Lewis, a Kellogg representative at Syracuse.

I have seen similar sheets as that of Exhibit 79. I recognize the two kinds of typewriting on that sheet.

Whenever we receive a proposal calling for Shredded Wheat as is indicated on here, we show that we are bidding on Kellogg's Whole Wheat Biscuits. We send the proposal back to the institutions with our offer, and they open the bids at a certain hour and read that publicly, so that they are always accessible for any one who is interested in finding out the prices, but I would just like to explain here that our general practice is always to fill in the brand as indicated in this column. This column calls for brand and we filled in Kellogg's. It states that bids can not be accepted unless size, kind, brand and if possible, manufacturer of each article is specified.

That proposal is our bid to supply Kellogg's Whole Wheat Biscuit.

It is quite general practice to receive two or three blank copies. I should not say blank, but partially filled in, calling for the items that they desire, and as this particular instance it calls for Corn Flakes and Shredded Wheat. In the item of Corn Flakes, there are undoubtedly six or seven different brands.

THE COURT: And you add those words and transmit the bid.

MR. VILAS: The paper that I handed your Honor, Exhibit 79, in its inception is a proposal or invitation to bid. When it is returned, it is an offer or a bid, upon which with others like it, the contract is awarded.

THE COURT: Is or is not awarded?

MR. VILAS: Yes, it is awarded to some one who bids on that particular form.

WITNESS: The practice as exemplified by Exhibit 79 is typical of the practice of the company under similar circumstances.

Mr. John Hopkins is the district sales manager of the company at Philadelphia.

Defendant's Exhibit 100-A is a proposal asking for a bid from the Government.

It is not a general practice to paste a rider on the bid. Mr. Hopkins does it because he wants to give a very detailed description of the product on which he is bidding, as you will note on the original sheet there is hardly room enough for him to fill in without having the letters very confusing, the fact that each package contains 15 biscuits, net weight of contents of each package is 12½ ounces.

Mr. Hopkins does that with my knowledge and assent. He wants to give a full explanation of the product he is bidding on.

As I have already stated Mr. Hopkins pastes a piece of paper on the proposal referring to Item 28-A-2 100 pounds Shredded Wheat to be Kellogg's Whole Wheat Biscuit package 24 packages to the case. Package containing 15 biscuits, net weight of contents of each package 12½ ounces. He does it to put on a full description of the product on which he is bidding. As you will note, this refers to the Federal specification NC 191, and inasmuch as there is no room to type in here, he has filled in this sheet. He fully explains what he proposes to furnish. The paragraph of the proposal calling for Shredded Wheat is a Federal specification as to the type of product wanted.

I never give approval to any company policy, no. This is not a general practice. Mr. Hopkins does it and with my knowledge, but I have never told him to do it, but I knew he did it. I have never told him not to do it. Mr. Hopkins likes to have all of the purchasing

officers fully acquainted with what he proposes to furnish, if our bid is accepted.

The Kellogg Company does not submit bids on all proposals. Bids are submitted upon proposals of institutions, calling for cereals, by jobbers and other dealers; just as they submit bids on all kinds of ready-to-eat service. In other words, Mr. Hopkins does not send bids for the Kellogg Company to the Philadelphia Navy Yard—that is left open to competitive bidding of the jobber.

The type of cereal that is called for on navy yard bids or proposals and other Governmental proposals, is Shredded Wheat.

Plaintiff's Exhibit 227 is a price bulletin issued by a Government institution—it is a bulletin indicating the award of contract. On page 4, under cereals are the words "Shredded Wheat" with reference to the specification—that is the Federal specification. Contract No. 12879, on the first page, is awarded to Price Brothers. To my knowledge they are wholesale grocers in Philadelphia. They carry Kellogg's products as well as all other cereals. I do not know whether they carry the National Biscuit Shredded Wheat. I imagine they do. The price bulletin indicates that a contract was awarded to Price Brothers for Shredded Wheat at a unit price of .118 cents. The price indicates either the Kellogg product or the National Biscuit Company's product. That I might say is just as in the case of Corn Flakes on there. They have not indicated what brand they propose to supply, so they can supply any brand of Corn Flakes. The Price Brothers could have supplied either Whole Wheat Biscuit like Kellogg's or the Shredded Wheat made by National Biscuit Company because they are both up to Federal specifications.

I know very frequently Kellogg's Whole Wheat Biscuit is supplied on a specification where only the

words Shredded Wheat appear, as both are always bid. We get the business sometimes and National Biscuit Company get the business sometimes.

Defendant's Exhibit 173 is a subsistence contract. The specification No. 191 is on that. The invitation or proposal to bid is in our branch office. This is our actual order. The contract is in the files of our New York office—or the bid. I asked our branches, of course, to send us copies of orders.

This can be supplied. It is dated 1933, so I believe we can supply that.

I have never called on the purchasing department of South Dakota myself. The representative of the Kellogg Company from our Minneapolis office calls on the purchasing department there.

I have no information as to the date on which the particular Exhibit 176 was printed or issued.

XQ. 297. Bearing in mind the specification as I just read it to you, namely, "Shredded Wheat, 12-ounce package, three dozen to the case," did the Kellogg Company bid on that particular specification?

A. We did not bid direct for the State of South Dakota. That is handled by the jobbers.

XQ. 298. Please answer the question. Did the Kellogg Company bid on that specification and fill the order?

A. No, the Kellogg Company does not.

XQ. 299. Could it?

A. The Kellogg Company could, because we can indicate the number of packages that we wish to supply in a case.

XQ. 300. Can you bid on a specification calling for a 12-ounce package, three dozen to the case?

A. It is quite a general practice to bid the different sizes.

XQ. 301. Can not you answer the question?

A. We did not bid on thirty-six packages to the case.

XQ. 303. It is a fact, too, is it not, that as you say, a jobber or a wholesaler whom you say fills or does the bidding in South Dakota, could not fill an order for Shredded Wheat, 12-ounce packages, three dozen to the case, with your product?

A. Not with the Kellogg product, but they can bid and indicate on the bid the quantity that they will supply, packed in a different number of packages to the case, and that is quite a general practice in all business.

WITNESS: May I explain this, so that there will be no misunderstanding regarding it? For example, we receive proposals calling for bids, that call for individuals, packed in 100 packages to the case. Outside of one item, we do not pack individuals 100 packages to the case. They are packed 50, with the exception of Whole Wheat biscuits, which are packed 60, and we change the quantity accordingly, cross out the 100, and indicating that we are putting in 50 packages and change the quantity accordingly, so that the contractor will get the proper number of packages which are called for.

RE-DIRECT EXAMINATION.

WITNESS: I do not know of any Federal specifications which would be specified by only a product of a single manufacturer. They are all drawn for competitive bidding, because that is what the Government desires as well as most of the State institutions.

As I indicated in my testimony yesterday, I saw the bids of National Biscuit Company for offering to supply the original Shredded Wheat under a bid or proposal called for by the Department of the Interior. I have seen two such bids that I can recall right at this minute, one for the Department of the Interior, and

the other for the Veterans Administration, both at Washington, D. C.

The proposal referred to under the name of the Department of Interior was opened a week ago last Thursday. I believe that is May 18th. It called for 1072 cases, of Biscuits, Whole Wheat, Shredded. It referred to the Federal Specifications for cereals calling for Shredded Wheat, paragraph 2-H.

May I state here that it is the practice in some of the departments of the Government to send only the required number of copies that they require to be returned, and I made the statement that the Marine Corps copy of our proposal or bid is in our New York office. If that was one where every copy was required to be returned to the contractor, we would not have a copy of that in our files. It would be in the files of the Government. I could not state for certain that it would be possible to get that from the Government files, but I rather imagine that it would. At least we can try.

The second bid that I spoke of was at the Veterans' Administration at Washington, D. C. It was last December, 1932, when that bid was opened, as I can recall the dates, and the bid called for Shredded Wheat 24, 12½ ounce packages, and they had indicates that they were bidding on original Shredded Wheat.

SIXTH DAY.

May 31, 1933.

HAROLD F. MUNTZ

resumed the stand on

DIRECT EXAMINATION.

WITNESS: I produce the bids of the Marine Corps and information as to the Price Brothers' bid. This Norfolk bid is a bid dated November 13, 1933, in which the product on the invitation to bid was wheat cereal, Kellogg's Whole Wheat, and the word "Kellogg's Whole" has been struck out by National Biscuit Company, and the word "Shredded" written into the bid, and then the amount of the bid dated March 13, 1933.

(Paper received in evidence and marked "Defendant's Exhibit No. 189.")

WITNESS: The Marine Corps for Washington, D. C., the exhibit referred to by Mr. Vilas on Friday, referred to a bid that we placed for delivery to the Quartermaster of the United States Marine Corps, Washington, D. C., and I have here our file copy of that bid. The proposal for bids came to us reading, "Item No. 45, Wheat Shredded, 12 ounce packages, to be in accordance with Federal Specification No. NC-191". We have offered to deliver or to furnish Kellogg's Whole/Wheat Biscuits, packed 12½ ounce packages to the case. We filled in the words "Kellogg's Whole Wheat Biscuit, 12½ ounce packages" and the price at which we were bidding.

THE COURT: In this instance you did what?

THE WITNESS: We filled in the name of Kellogg's Whole Wheat Biscuit, 12½ ounce packages, offering to supply that on this bid.

THE COURT: And transmitted that as part of your bid?

THE WITNESS: We transmitted that as the bid itself. That was the bid itself and was sent to the United States Marine Corps at Washington, D. C.

(Paper received in evidence and marked "Defendant's Exhibit No. 190.")

THE WITNESS: Referring to Defendant's Exhibit 189, in evidence, a bid of the National Biscuit Company, reading "Wheat, Cereal, Kellogg's Whole Wheat Biscuit, 1½ ounce packages" the defendant company does not strike out any special brand name as Kellogg's, or Original, or Niagara, in returning those bids. When we receive a request for a bid, we always fill in the name of Kellogg's Whole Wheat Biscuit. We do not strike out any printed name. We feel that that is actually altering the bid. In our evidence, we have submitted cases just where it shows the brand name National Shredded Wheat and NBC Shredded Wheat. There are two such examples in at the present time. At the present time we do not bid on them, because when there is a brand name "National", the same as "Kellogg", that means the Navy Department or the Army departments want that particular brand because it is for retail purposes.

THE COURT: When a manufactured product is requested you do not bid?

THE WITNESS: We do not bid. For a while we bid. We soon realized it was futile, because the particular manufacturer's brand is specified and there is no chance of our getting the business as long as the National brand is specified. We say we are not bidding on another's whole wheat biscuit, and in the event we did get the award, it is not filled in the name of Kellogg's Whole Wheat Biscuit. We would have to supply the National Shredded Wheat. We no longer bid on those, because there is a very specific demand for that man-

ufacturer's product, and those are resale articles, and the defendant is permitted to specify brand names for resale articles.

On the Marine Corps order which was referred to on Friday, for which we were requested to supply copies of our bids, there were three orders, one a bid placed at our Boston office, one at Philadelphia and one at New York. The Philadelphia proposal has already gone in, and here is a typed copy of our bid for the Boston office which does not call for any Shredded Wheat Biscuits.

It was necessary for us to return to the Government all of the copies they sent us. We are always in the habit of making some record of what we place a bid on, but in this particular instance, as it was called for on the order, there was no Shredded Wheat Biscuit. The uniform practice is for the Government to send three mimeographed invitations to bid and to ask that all three, or either two or three be returned.

The plaintiff requested us to produce a bid placed by Price Brothers for delivery to the Philadelphia Navy Yard. I do not recall just what date the bid in question was, the date that it was sent out. We went to Price Brothers and we have the latest bid that they have in their file, and they tell us that they always after the award has been made, they destroy copies of their bid.

We have the copy of their bid, however, for May 18, 1933, in which Price Brothers have placed a bid to the supply officer at the Philadelphia Navy Yard, Philadelphia. Price Brothers are wholesale grocers and market our goods as well as other cereals on the market. In making the bid, they are not acting as agents for the Kelllogg Company; they buy our products and resell them in the regular course of business transaction. They are acting as principals on their own behalf.

In this bid the reference is to "Shredded Wheat—see detailed requirements of above specification, paragraph E 2-H"—and the quantity to be bid on is one thousand; written under that "In bulk commercial packages." That is the way the bid was received, and then the words written in in pen are "Kellogg's W. Wheat, 12½ ounces", and the figures, the net price, .118, and the total amount \$118.

(The paper was received in evidence and marked "Defendant's Exhibit No. 191.")

RE-CROSS-EXAMINATION.

THE WITNESS: Defendant's Exhibit 189 is an invitation to bid and a copy of a bid of the National Biscuit Company. Defendant's Exhibit 173 is not the contract on which that bid was awarded. Defendant's Exhibit 190 relates to the contract Defendant's Exhibit 173, that was our copy.

Referring to Defendant's Exhibit 189 which is the bidders' copy of the bid to Norfolk, Virginia, I observe on the second sheet the item "Cereal, Shredded Wheat, in packages of 5,000." The Kellogg Company bid on that item. When the bid was received, we filled in, possibly right in here, "Kellogg's Whole Wheat Biscuit." We either did that, or we pasted the sheet on here. We usually do both to show that we are placing our bid to supply Kellogg's Whole Wheat Biscuits. On the third sheet is an item "Wheat, Cereal, Kellogg's Whole Wheat Biscuit," and we also bid on that. I am quite certain that the contract was awarded to the Kellogg Company. At the present time, where a brand name is specified, we do not place bids. When we first started to handle Government business a few years ago, we did, because we did not realize the whole significance of the specification of the brand name, as for example, Selfridge, Field, they called for Shredded

Wheat, National, and that is a brand name—National—when we put Kellogg's Whole Wheat Biscuits on a bid, that specifies the brand name. On National, we never get the business, even though our price is lower. When brand names are specified it is always on commissary requirements, for resale items. But when we find a bid, as we just did in Exhibit 189, Shredded Wheat for subsistence supplies, we write in Kellogg's Whole Wheat Biscuit. When bidding upon specifications calling for Shredded Wheat, I did not and do not know that the words "Shredded Wheat" have been filed in the United States Patent Office as and for a registered trade-mark. I have examined the plaintiff's packages Plaintiff's Exhibit 1 and Plaintiff's Exhibit 148, and I observe that under the word "Shredded" is found the expression "Trademark, Reg. U. S. Pat. Off." I have never observed that before although I have seen packages like that before. The Federal classification calls for bids on any brand of Shredded Wheat.

On Defendant's Exhibit 191, the words "Kellogg's W. Wheat" filled in by pen and ink were filled in by some representative of Price Brothers in Philadelphia.

It has been the company's practice to write in on bids calling for Shredded Wheat the words "Kellogg's Whole Wheat Biscuit" ever since I have been placing bids; we have always handled them that way. We did not call our product Kellogg's Whole Wheat Biscuit until 1930, but from that date on we have always filled in the name Kellogg's Whole Wheat Biscuits. We have never bid the Kellogg product and supplied it upon bids calling for Shredded Wheat without filling in the words Kellogg's Whole Wheat Biscuit or their equivalent.

Before 1930, when we began calling our product Whole Wheat Biscuit, it was designated on the bids

as Kellogg's Shredded Whole Wheat Biscuits. It was our custom then to fill in on bids Kellogg's Shredded Whole Wheat Biscuits. We never placed any bids without fully describing the product that we are offering to supply. All proposals usually request that brand names be specified on the products. I have placed many such bids myself, and many have been placed by branch offices directly under my supervision.

Referring to Plaintiff's Exhibit 227, and Defendant's Exhibit 191, the only difference in these two is that this is the bid offering to supply Kellogg's Whole Wheat Biscuits for June delivery, and this is the Price bulletin of provisional contracts for March. Price Brothers' bid for March delivery was identical to this, but has been destroyed.

MR. VILAS: Pointing to Exhibit 191.

THE COURT: Who projected Price Brothers into this case?

MR. VILAS: Price Brothers came into the case during the taking of the deposition of John Hopkins, the general sales agent of the defendant company for Philadelphia territory.

THE WITNESS: These two exhibits indicate a bid by Price Brothers and an award of the contract under which Kellogg's Whole Wheat Biscuit was supplied, but the bid is dated May and the provisional contract is dated March. The bid was identical with that made for the March business.

RE-DIRECT EXAMINATION.

With regard to all of the bids concerning which I have testified, we have at some time or another, placed samples with every department of the Government and State.

OTIS K. BERRY.

DIRECT EXAMINATION.

I am district sales manager of the Kellogg Company, and have held that position for four years, the first of last October. Previous to that I was connected with the Kellogg Company as a salesman, ten years the 19th of last March. I was not in the grocery business before going with the Kellogg Company. My district embraces the major portion of the State of Virginia, all of North Carolina, and the major portion of South Carolina, with one or two counties in West Virginia. I have eleven sub-districts and about fifteen men varying; sometimes it will 12 and sometimes 15 or 16; Mr. Munz does some work in my district. As sales manager, I am called upon to market Kellogg's Whole Wheat Biscuit. A consumer demand has been created in my territory. At the start it is our job to go out and sell the wholesale grocer any new product that we are marketing. Referring to the Whole Wheat Biscuits, we first sold the Whole Wheat Biscuit to the wholesale grocer and then we endeavored to sell it to the retailers, and at the time that we sold it, we usually put on, if possible, campaigns, throw several salesmen into one large city, and what we call crew work.

We would go to these stores, sell them on our biscuit, prominently display it in the stores, in the windows, and endeavor to get the store to allow us to place a package near the cash register for display purposes.

We always endeavor to sell this product as Kellogg's Whole Wheat Biscuit and would not stop there. We would explain to the grocer that we were going to do follow-up work. That follow-up work consisted of sampling, house-to-house, and we have also done other house-to-house work by selling one package and giving one package free. In the manner—

Q. 14. Is this one package of Whole Wheat?

A. One package of Whole Wheat to the housewife at the regular retail price that the grocer charged for it, and give her one package free. We would go up to the house and always carry a package open and explain to her that this was a new product, Kellogg's Whole Wheat Biscuit, and in order to get it on the market and get people familiar with it, we were doing this special work. If you buy one package, we give you one package free.

We usually, in fact, in my territory, we have always paid the retailer his regular retail price for the package given away free.

Then in addition to that, we have been using cards. We would go into a retail grocery store, usually we picked the stores that we thought or figured would be good merchandisers, people that would give us a little publicity probably in advertising or by letting us prominently display the product in their store, we would take the names of fifty or more of their customers and send to each one of these customers a card stating that if you will take this card to your retail grocer and purchase one package of Kellogg's Whole Wheat Biscuit, he will give you another package free. Then we in turn pay the retail grocer the retail price for the card that has been turned in to him.

In addition to that we have had very definite tie-ups with some of the cooperative chains of larger grocers, by having two of these Kellogg Whole Wheat Biscuit packages tied together at the factory with what is known as a Geography Chart, and we have also merchandised them with what is known as our Jungle Land Books. Then we have used some—little novelty premiums with the packages. In addition we had song and rhyme books tied in the same manner, and have done a general job of house-to-house sampling, with our salesmen, and they hire four boys that carry

these samples in bags and deliver them door to door in the city; to drive the point home that it was Kellogg's Whole Wheat Biscuit, in each instance we have one of these boys take a full sized package to the door and explain to the lady that the next time she bought Whole Wheat Biscuit, we would like to have her try Kellogg's in this package, and we would hand her the little package.

We would open the package and tell the grocer it was a new product, Kellogg's Whole Wheat Biscuit, small biscuit, fits the bowl, and there are also 15 biscuits to the package, $12\frac{1}{2}$ ounces, packed 24 to the case; and the consumer work, we have spent a great deal of money and done a great deal of advertising on our Saturday trade promotion sales. We usually featured this Whole Wheat Biscuit in our Saturday sales, selling three other packages of Kellogg's products and giving one package of Whole Wheat Biscuit free. All our packages are cut open, across this slit, to show the product, and also the Kellogg name; we have always used that method to show customers that come into the store, and we feel that is good advertising, because the customers will see our product and be attracted by them. We put a great deal of effort behind Whole Wheat Biscuit in that manner.

The purpose is to promote good will and sell our merchandise and the manner in which it is handled is for us to go to the grocer Monday or Tuesday before the Saturday sale and sell him the idea of featuring our products and giving us a large order to take care of the demand which we hope would be created through the special sale that he would run on our products. We always requested him to mention this special in his ad.

In my territory the ads usually run Friday, and on Saturday one of our salesmen goes into the store and works from the time it opens until 10 or 11 o'clock at

night. We endeavor to get all of the clerks to push our merchandise as a little help to us in promoting the sale of our products.

THE WITNESS: Our salesman contacts customers all day long, and endeavors to sell them on our products and tell us about the Kellogg line in general. Outside of the large chains—and by that I mean the A. & P. Tea Company—we have had, we consider a very thorough distribution of the retail stores in my district. I would estimate that we have made from 65 to 75 per cent. distribution on our product, outside of the chains. My sales methods are no different as applied to Whole Wheat Biscuit from what they are as applied to the rest of the Kellogg Cereal line. We use the same methods. I have seen the small individual package of the plaintiff in restaurants in my section and I have also found their large individual packages in restaurants. I do not recall seeing both of them in the same restaurant. I have seen the little individuals or the small packages referred to and the larger in one restaurant and the larger individual packages in other restaurants. On the small package, the plaintiff's biscuit is a very small biscuit more similar to our biscuit; and the large biscuit is the same as is displayed in their Exhibit No. 1; it is quite a bit longer. Defendant's Exhibit No. 60 is what I consider one of the small individual packages.

THE COURT: The remarkable thing is that this large individual has a small biscuit in it.

THE WITNESS: Yes, sir.

MR. VILAS: May I explain that? I show your Honor an exhibit, which I think is Plaintiff's Exhibit 21, in which I explain how the waitress put two Kellogg biscuits back in our package, and put it back in stock. Those were Kellogg's biscuits in

our package, and that is what happened to me in Burlington, Vermont, as I explained in my statement about the depositions.

(Package received in evidence and marked "Defendant's Exhibit No. 192.")

THE WITNESS: Exhibit 192 is a package of so-called standard size individual cartons. The defendant company has no other individual size, and the biscuits she brought are the same size as the regular standard biscuit of the defendant. I have had no reports and have had no observation of conditions of confusion in my district between the plaintiff's product and the defendant's product.

In the chain stores there are a great many specials run on Defendant's Exhibit 1, at 2 for 19 cents. The prevailing price on our product is from 12½ to 15 cents.

Their prices vary a great deal. Some chains sell it for 19 and 11 cents, and retailers sell it from 12½ to 15 cents. Of course, we have had several grocers that would run them on a special sale at a little less. The name Kellogg on the Whole Wheat Biscuit has trade value in introducing the product. It greatly facilitates the matter of getting a Kellogg distribution. I know that it is a very easy matter to sell our product, especially a new product—to either a wholesaler, retailer, or consumer.

I do not know how long the defendant's small carton of individual biscuit like Defendant's Exhibit 60 has been on the market. I never saw it before this year. Before I saw plaintiff's small carton corresponding to Defendant's Exhibit No. 60, I had seen the plaintiff's large individual carton like Defendant's Exhibit 59. It has been there ever since I have been on the territory, and I have been there four years last October. So that up until this year, the competition in the individual

packages has been between defendant's small individual, like Defendant's Exhibit 185, and plaintiff's large individual, like Defendant's Exhibit 59. And this year, for the first time, I have encountered plaintiff's small biscuit in the individual carton corresponding to Defendant's Exhibit 60. I have never, at any time, encountered in my territory any of plaintiff's small biscuit of the size of Defendant's Exhibit 60, packed in the large or standard size carton that is 12 biscuit to the carton.

CROSS-EXAMINATION.

I observe on the top of the bundle of advertising, marked Defendant's Exhibit No. 137, a newspaper advertising two packages of Kellogg's Shredded Whole Wheat Biscuit for 19 cents. I have no doubt that retailers sell them for that figure, and on the very top newspaper of the other large bundle, known as Defendant's Exhibit No. 134, I see an advertisement Kellogg's Whole Wheat Biscuit, 3 packages for 25 cents, and I have no doubt that they sell them for that price.

Prior to four years ago last October, I was located in the New England states for the Kellogg Company; and it was in October, 1929, that I took my present territory. I was six years in the New England states, and during that time I saw plaintiff's product Shredded Wheat sold in individual cartons of the same size and appearance as Defendant's Exhibit 59 in restaurants. So far as I know, that was the plaintiff's original individual size cartons. I cannot say definitely how far back my acquaintance with that goes. I have seen that package on the market a good many years, certainly all of the time I was in New England, and I have seen it during the whole time that I have been in my present territory. I have seen the small package in some restaurants this year, but that package has been in others so far as I know. The original

individual sized package of the plaintiff like Defendant's Exhibit 59 that I have seen during this whole ten years.

I do not know off-hand how many packages containing 15 biscuits of the Kellogg product were given away in my territory to householders while introducing the Whole Wheat Biscuit, and I cannot give you any idea. I should say it would run into many thousands which were given away with the purchase of one package or with the purchase of three packages in Saturday sales. I would not say it was fifty thousand and I cannot say anything except many thousand. I have no definite idea behind the word many. I could not state during what period of time this large quantity of biscuit were given away, but I have been doing it for a long time. I have done the bulk of this business in the summer or early fall. I do not recall having done any in the spring.

We have used it in some territories once, some territories and other times in several territories; in other words, we have done it where we thought we could get the greatest possible result in doing house to house work.

I could not state the time definitely whether it was the summer of 1929 or the summer of 1930, but I know definitely that we did house to house work in distributing free packages of Kellogg's Whole Wheat Biscuit in 1931.

I cannot recall whether in distributing packages we gave away packages like Plaintiff's Exhibit No. 3 to the interrogatories. I could not state whether it had the words Shredded Wheat on it or not. I know that it had Kellogg's and that is all that I know, and I do not know whether it said Shredded Whole Wheat Biscuit or Whole Wheat Biscuit. I cannot state whether at any time we distributed free packages prominently marked with the words "Shredded Bis-

cuit" in substantial sized lettering like those on Plaintiff's Exhibit 3 to the interrogatories. Since I have been in that territory, I think the packages have had Kellogg's Whole Wheat Biscuit on them.

In connection with this business, we furnished grocers cuts for advertising matter for them to use. We did not pay for that advertising, and we did not make any allowance to the grocers, giving them nothing directly or indirectly of value. We did not furnish free goods to the grocer when introducing the goods, except that if they bought so many for a special sale immediately after local advertising, in some instances the grocers do not advertise and we have helped sales in the stores, even though the sale was not advertised; it was not compulsory. I cannot state definitely whether in distributing business, we ever gave one case of Whole Wheat Biscuit free for each six cases purchased by the grocer. I think that we have in times gone by had what is known as special deals for a certain length of time whereby we gave the wholesaler one case free if he bought a certain number. At the present time we have a deal on our corn flakes, buy six cases and get one free. I do not know whether we have had a similar deal on biscuits or not, but we have had since the time I have been in Richmond deals on that product. I do not recall any such deal on Whole Wheat Biscuit since I have been in Richmond, and I think I have a fair memory but not on that subject.

XQ. 113. Now will you pick out from among all of these Kellogg cartons on Shredded Wheat Biscuits that are here, the one which you can distinctly remember as the first that you gave away?

A. This package here (indicating Plaintiff's Exhibit 201).

MR. COOPER: That is the same, your Honor, as Plaintiff's Exhibit 1 on the interrogatories.

THE WITNESS: I do not recall whether or not that is the first package we used. I do recall using that package for free distribution to the housewife, but I could not state whether I used for free distribution at about the same time the cartons like Plaintiff's Exhibit 3 to the interrogatories.

I testified I thought we had between 60 and 75 per cent. distribution in my territory in the retail stores outside the chains. I am referring to the A. & P. as the large chain. That means that, according to my estimate, from 60 to 75 per cent. of the retail stores outside of the chain stores carry Kellogg's Whole Wheat Biscuit; and, whether they sell it or not, I still found a store that has had some on hand as going to make up the 60 or 75 per cent. The Kellogg Company does not fix the price at which the retail store shall sell Whole Wheat Biscuit. We have always suggested that retailer and wholesaler alike make a profit on our items. We do not state which prices it shall be sold for. So that if the retailer wants to sell it at any price he chooses that is his business. We always request when an unusually low price comes out that they refrain from pursuing that practice. However, that is left entirely up to the grocer. After the merchandise is his, as I understand it, he is the owner and can sell it for whatever he wishes. I should consider three packages for twenty-five cents a very low price, and two for nineteen cents would be unusually low for my territory. In instances where a particularly cut-rate store has featured Corn Flakes at five cents a package, we have asked them if they would not just as soon get a profit for it. We would probably do the same thing on Biscuit if it came to our attention.

During the time I have been with the company, I have handled Whole Wheat Biscuit in cartons like Plaintiff's Exhibit 3 to the interrogatories. I have, myself, gone around to householders, carrying cartons

on some of these campaigns; but I do not definitely recall ever having carried such a carton as Plaintiff's Exhibit 3 to the interrogatories. I will not say that I did not.

RE-DIRECT EXAMINATION.

WITNESS: The plaintiff has sometimes given free deals on special sales of Shredded Wheat, and they have used similar sales where it was three for ten in my territory in selling merchandise other than at the regular price. That is a common practice in the cereal line, especially in the last three years. We have had several deals on Corn Flakes, Bran Flakes and other cereals as well as other Whole Wheat Biscuit. We consider that selling Whole Wheat Biscuit as low as three for twenty-five cents is very much to our disadvantage. That is our reason for, when the thing is called to our attention, endeavoring to get the dealer to charge more for it so that he can make at least a reasonable profit. We are afraid that it might affect the attitude of other dealers towards the product.

WILLIAM P. PENTY.**DIRECT EXAMINATION.**

I am fifty-four years old, and am employed by the Kellogg Company in charge of supervision of the work of the experimental department, and also the supervision of the processing and quality of our several foods. I have been with the Kellogg Company twenty-two years—that is, with the Kellogg Company and its predecessor Kellogg Toasted Corn Flake Company.

I started with the Kellogg Toasted Corn Flake Company on January 16, 1910, and for the first three months I was employed as a roll man in the corn

flake department. In March of that year I was placed in the experimental department, and on May 8th of the same year previous to that, we had two twelve-hour shifts. We started our three eight-hour shifts, and on May 8th I was placed as the general foreman on the three to eleven shift, retaining the supervision of the experimental department.

This has continued until the year 1929, with the exception of about a year and a half that I was out of the employ of the Kellogg Company, and since 1929 I have taken over the entire work in the experimental department and the supervision also of the processing and quality of our several products.

I have had to do with the product known as Kellogg's Whole Wheat Biscuit. We are working continually to produce new foods and to improve, if possible, the quality of foods that we are running at the present time. That comes under my charge in the experimental department.

In the regular production I have the supervision of the quality of the Biscuit to see that they are up to the proper standard, to see that they are properly processed at all times and, if for any reason, they are not to take it up with the foremen or workmen connected with the processing of the foods.

During my connection with the Kellogg Company, I have been a member of the City Commission of the City of Battle Creek for the past eleven years, and have had two terms of four years as Mayor of the City of Battle Creek, a city of fifty thousand population. The duties of mayor is not full-time work, but I would be in the office in the City Hall every afternoon from 2:30 to 5 or 6 o'clock. The Kellogg Company allowed me that time to take care of the duties of mayor. I reported every morning at 8 o'clock to the factory, and took the lunch hour along about 2:30 in the afternoon would go to the Mayor's office; and

after finishing those office hours I always returned to the factory and made general check-up of the plant, and sometimes came there again late in the evening.

Under my supervision, we have developed the products which are known as All-Bran, Bran Flakes, Pep Bran Flakes, Wheat Flakes, Rice Krispies, Wheat Krispies, and Shredded Whole Wheat Biscuit. I had to do with the experimental work in connection with all of them. I have also been connected with the actual production of these products and am familiar with the method of processing Kellogg's Shredded Whole Wheat Biscuit. We purchase winter white wheat, which is received in box cars, and before being placed at our unloading dock, samples are taken, which are run through our testing laboratory, to see if it is up to the standard we require for our Shredded Wheat Biscuit. If it is up to the standard, no decay, it is unloaded and placed in bins—in concrete bins. We have a number of a capacity holding about 5000 bushels, as our capacity in the bins which we have, and it is removed from the bins, preparatory to cleaning or cooking. It goes over a large Invincible compound shaker, which is double separation, which removes sticks, paper and straw, hulls, corn, beans, and other material larger than a berry of wheat, after which it is conveyed to a Carter disc-separator, which is a machine composed of three units, the upper section removes oats, hulls, beans and corn or materials that would be larger than a berry of wheat, and the center section removes the smaller berries and oats and corn and alfalfa or alfalfa seeds and it goes to the lower section, which removes the broken berries and smaller or lighter materials, after which it gets to a set of stoning machines, to remove stones and any material which is heavier than a berry of wheat.

After passing through those stoning machines, it goes through an Invincible Duco Separator, operated

by air, which removes the broken and small particles, or particles of lighter than a small berry of wheat, and also any fine seeds that might be retained. From that machine it is transferred into the No. 2 building, as we call it, with large bins, where it is stored, preparatory for cooking, and on travelling over to No. 2, it passes over a supersyphon machine to force out any foreign matter which may still be retained in the grain, lighter or heavier than a berry of wheat.

THE COURT: Dust!

THE WITNESS: Yes, such things as that. It is then ready to be cooked, and it is taken from these receiving bins and placed in hoppers, where we weigh it for the amount that we wish to place in our cooker, and it is then placed in a Lang cooker, as we call it, a cast-iron cooker, which has on the inside a perforated shell, which holds and retains the wheat, and we cook each cook—we cook it in steam. The wheat is placed in the cooker first, and then it is thoroughly covered over with water. We generally figure five or six inches of water over the top of the wheat, so that there is plenty of water, and it is cooked at a 17-foot steam pressure for twenty minutes, after which we open a valve underneath the cooker and permit the water to be drawn off, and the wheat is retained in that inside perforated shell.

We then steam it with dry steam for five minutes, which draws the outside of the wheat and permits it to flow more easily and to be dried. It is discharged from the cooker into a Huhn drier, through which warm air is passing. It passes through there. It is only in there a few moments to remove the exterior moisture, and is then conveyed to our tempering bins. We have a series of wooden bins. The wheat is placed in for tempering and left to remain in for eighteen hours.

After tempering for eighteen hours at a temperature not to exceed 80 degrees Fahrenheit in the room,

it is then ready for the process of shredding. It is then taken from those bins and conveyed in conveyors over the tops of our shredding heads.

We have a battery of 27 shredding heads each containing two rolls, one roll is grooved and the other being plain. The grooved roll, there is attached to that a comb-like steel scraper which fits into the grooves and discharges the shreds on to the receiving traveling belt below.

(Witness refers to blueprint diagram.)

THE WITNESS: There are 54 shreds, it is a $2\frac{3}{4}$ face across, and 55 lugs, but 54 shreds in each one. The depth of our shredding roll, our shreds are $20/1000$ ths each, and they are $50/1000$ ths on center, and $2\frac{3}{4}$ face, and 6 inches—

(The blueprint used by the witness was received in evidence and marked "Defendant's Exhibit No. 193.")

THE WITNESS: I produce a book containing 13 photographs numbered, showing as follows: No. 1 shows the shredding head and the conveyor which conveys the wheat from the bins above these hoppers, the wheat goes down into the hopper, and this little hopper is where it goes down between the two rolls, the rear one being the plain, and the front the shredding mill, and then it is enclosed there, and it goes on to the receiving belt below. Photograph No. 2 is the biscuit mill from above which shows the two rolls, the shredder roll, and this is the plain, where they are run together with the wheat down in the center.

Photograph No. 4 shows the wheat shred. This is the shredding mill, and this is where the comb-like scraper sets into the little grooves which allows the shreds to come off of the shredding roll and deposits on this receiving belt below which is slotted here, and

there is now the shreds coming from 22 to 23 mills. They then pass on to our cutting chain which sets down into the slots right here, and register the top cutting belt with the lower. No. 3 is a close-up of a biscuit mill showing the wheat shreds.

No. 5 is a photograph showing the shreds which have been removed from the receiving belt below to give an idea of holding together and just showing the shreds.

No. 6 is a photograph showing the raw shreds of wheat before formation in the biscuit. They are placed on a pan which is in the length to take a photograph showing the shreds in the length.

No. 7 shows the front of one of our ovens. It is closed and just shows the front of the oven and a belt coming along where the biscuits are discharged into it.

No. 8 shows the biscuits as they enter the oven on to the brackets on the revolving Ferris Wheel-type oven. The biscuits are placed on the perforated pans on the brackets.

No. 9 shows the toasted biscuits leaving the oven after they have been toasted for 45 minutes at a temperature of 400 degrees. The bottom is served by the perforated pans and it allows the heat to penetrate.

No. 10 is a close-up of the biscuits leaving the oven.

No. 11 is a tray of toasted biscuits which have been removed and a photograph taken of it. It shows the perforation on the pan.

No. 12 is a picture of our biscuit baking line showing our semi-automatic packing machine.

Photograph No. 13 is a close-up of the packing line showing the young lady putting the carton on the block of the semi-automatic packing machine after it had been filled with biscuits and flaps top and bottom.

The whole wheat goes into the hoppers over the shredding rolls which is composed of one grooved roll

and one smooth with a scraper which removes the shreds on the receiving belt below.

We use from 22 to 23 mills and sometimes it will vary one more or less to get the proper weight for our biscuit, and after the required amount is deposited on the receiving belt below, it is carried on this belt to our cutting belt which is an endless belt equipped with cutters which fit into the slots below, on the lower receiving belt.

These cutting edges are not sharp. They are about 3/32 wide, so that they do not give a sharp cut. It is more of a nip off or weld, so as to weld the biscuit together on the side. If it was a sharp cut, it has a tendency when they get into the oven and being toasted, and they start to puff and crack on the sides. I mean that the shreds run lengthwise with the belt, and instead of using a sharp knife to cut these shreds crosswise into the biscuit, you use a rather dull knife which nips them off rather than a sharp cut and presses the ends of the shreds together. And the top cutting belt is equipped with a perforation on the chain and blocks which allows a suction of air or vacuum to retain the biscuits after they cut and form them, and they carry them along over to the top or suspended over perforated pans on which they are toasted, and as they get to the end of the pan, 20 of those biscuits are released by a cam operation, which releases the air or vacuum and deposits them on the pan below.

The pan automatically moves forward just far enough to allow the second row to be deposited without touching the biscuit that has previously been deposited there until four rows of 20 biscuits each, or 80 to the perforated pan, that fills the pan which is conveyed to our toasting ovens which are of the rotary Ferris Wheel type, and they are then placed in the oven from the conveyor on the brackets on the inside until the oven is completely filled, after which it is revolved

down into the heat and up in order to allow the moisture to be expelled from the biscuit, as it is in the process of toasting, for, in the neighborhood of 45 minutes at 400 degrees Fahrenheit of heat, after which they are removed from the oven on to a conveyor belt where they are conveyed over to our evaporator and there placed on racks.

These racks are placed inside of our evaporator which has a chain on the bottom equipped with lugs which carries the pan slowly through the evaporator.

Q. 34. Are they still in the pan?

A. They are still in the perforated pans.

Q. 35. Right there, I might ask you what is the purpose of the perforation in the bottom of the pans with the 80 biscuits in the pan?

A. That is to assist in toasting the bottom of the biscuit. They are then conveyed through the evaporator by these lugs coming in contact with the rack, for it takes about one hour at a temperature of 210 degrees. After being removed from the evaporator, they are set to one side in the racks on the perforated pans, to allow it to thoroughly cool before they are packed. They are examined when they come out of the evaporator to see that they are free of moisture, to insure safe packing, and they generally take a biscuit and break it in their hands and see that it is dry, which is the test we make, and there are moisture tests in the laboratory.

They are then conveyed on a belt past an inspector who inspects the biscuits to see that there are not any broken biscuits or some that might have gotten broken in the process of making, to our semi-automatic packing machine. This semi-automatic packing machine is equipped with 32 hoppers, blocks or hoppers, which has hinges on the side and it opens up at an angle of about 45 degrees which permits the girl to take three biscuits at a time and send them in there, and then a divider until 15 biscuits and 5 dividers have been placed

in this block which automatically closes, and then the girl places a carton over the top of this box which is open, both top and bottom.

The carton then goes to a sealing machine which puts glue on the bottom flaps and then continues on through a drier which dries the glue on these bottom flaps and seals it and travels on to the end to a conveyor where the biscuits are automatically transferred into the carton, which then travels along a belt for our final inspection of the biscuits at the top, and see if the carton is properly filled. There is another divider placed on the top to keep any glue from getting on to the biscuits. It then goes to our top sealer where glue is put on the top laps, the carton laps, and then is conveyed to our packing table where they are packed 24 cartons containing 15 biscuits each in a case, or 360 biscuits in all.

The photographs show the operation of taking the biscuit in the metal tray by which they are inserted into the carton.

Photograph No. 12 shows the block as it comes to the girls at about a 45-degree, which permits them to slide the biscuits right down into them until it gets down to the end where it automatically closes. The girl places the carton open on both ends over the block. Then after passing around through this drier belt, it automatically is discharged from the block into the carton at this point, and goes for final inspection to see that the carton is properly filled. I superintended the taking of these photographs personally.

(Book of photographs was received in evidence and marked "Defendant's Exhibit No. 194.")

THE WITNESS: There are 22 or 23 layers of shred. It varies one mill. As a general rule, we are using 22 shredding mills, and that determines the number of

layers in the biscuit. Each shredding roll is $2\frac{3}{4}$ on face and makes 54 shreds. The receiving belt below the mills, which travels at a slightly faster speed than the mills to allow the slight stretch to the shreds, which is necessary; when the cutting knife comes down from the cutting above, it further stretches those shreds, so that when they are placed in the oven and the heat comes in contact, it naturally gives a puff or rise to the biscuit. If they are not stretched a little, they do not have a tendency to do so; the second belt cuts and forms the biscuit and lifts the biscuit off the lower belt until they are over the pan and are fixed twenty at a time. It is released by a cam movement.

For our biscuit products, we require white winter wheat, matured berry, not to exceed 10 per cent. of red wheat. There is a little sprinkling of Durum wheat. It seems impossible to get it free of all Durum. We prefer the white wheat. We have a small amount of Durum, but in our standard for biscuit work, it must not exceed 10 per cent., and the ideal is to remove it all, if possible.

In our experimental work, we have found that eighteen hours tempering of the wheat seems to be the best to make a good strong shred. We tried to shred the wheat at 42 per cent. of moisture to the shredding roll. If we shred too much over 42 per cent., the wheat is more sticky and would be too wet, so that it makes the biscuit a little heavier and they do not puff as well as they do at 42 per cent. About 25 per cent. of moisture is taken out in the process of toasting, so that when they come out of the oven, there is probably 15 per cent. of moisture still in the center of the biscuit. The top and bottom seems to have dried out practically in the operation of toasting. Through the Huhn drier there is some moisture removed. When the biscuit comes through the evaporator, the moisture is

down to 3 or 4 per cent., which we consider dry enough for packing and keeping.

The package marked Exhibit No. 146 resembles the biscuit Kellogg Company made in 1922.

We determined that 3 or 4 per cent. moisture would not interfere with the keeping of the biscuit through experimental work. We have packed biscuits at different moistures of $2\frac{1}{2}$ to 5 or 6 per cent., and laid them away to determine their keeping qualities, with more than 3 or 4 per cent., the biscuit does not keep as well, and is apt to become moldy and rancid, so that if it is over 4 per cent. we put them back through our drier again to remove any excess moisture.

We shred our wheat at approximately 42 per cent. moisture, of which the oven reduces 25, leaving 15, and in the process of going through the evaporator, it removes all the moisture with the exception of $3\frac{1}{2}$ or 4 per cent., which by an analysis in the laboratories shows still remains, but if you would take that biscuit and crumble it up into your hand, after it comes out of the drier, it all goes into flour and it is apparently bone dry.

The difference between the Kellogg Shredded Wheat Biscuit and the National Shredded Wheat Biscuit is that one is smaller than the other, and one biscuit is more prominently, the small biscuit, is toasted on top and bottom more than the other. The smaller biscuit is the Kellogg biscuit. Practically the only two points that I see of difference in the size and in the toasting.

In my opinion, it would not be possible to manufacture a practical biscuit of the type of this triangular biscuit from Plaintiff's Exhibit 241. One reason is on account of the sharp hard cutting edges which are objectionable. The other is the irregular shape, and also on this end of the biscuit, being small, it is

hard and has not—is not puffed as much as it was if it was not closed. It is very necessary to have those open ends on the biscuit from the standpoint of proper puffing, and to allow the heat to penetrate the biscuit properly beside. In my judgment, a practical biscuit should be one with the minimum amount of the edges open on both ends and toasted both top and bottom.

In my judgment, the diamond shaped biscuit in Plaintiff's Exhibit 240 are not practical biscuit because you have four of those sharp, hard edges, besides it is not open on any of the edges properly—to be properly puffed. It would not puff as well as an open end biscuit. The puff is essential to the distribution of the heat, and in manufacturing the shred you stretch them on your receiving and upper cutting belt, drawn tight; and it has a tendency when it gets into the oven and the heat penetrates to the center, to bring those objectionable spaces in closer, and in making our biscuit, we just nip it off, instead of cutting it, so that the heat has a penetration effect and lets the biscuit rise.

In the manufacture of the defendant's Shredded Wheat Biscuit, nothing is added to or taken away from the wheat.

In my judgment, the doughnut-shaped biscuits in Plaintiff's Exhibit No. 242 would not be practical biscuits for the same reason that you have the entire outer rim on the sharp, hard edge, and also in the center, and they are enclosed all the way. That does not allow the heat to penetrate as well as though they were open.

In my judgment, the biscuit in Plaintiff's Exhibit No. 245 are not practical Shredded Wheat Biscuit. They have not been stretched the way they look. They look more as though they had been coiled around, instead of running along in stretch, and it is closed on

all sides, and I would not consider them a practical Shredded Wheat Biscuit.

In my judgment, the biscuit in Plaintiff's Exhibit 244 are not practical biscuit for the same reason that they have a hard, sharp outer edge and are not open to permit proper toasting.

In the manufacture of the defendant's Shredded Wheat Biscuit, there is a slight amount of spoilage sometimes at the panning machine, but we do not reprocess our scrap. It is sold for wet feed. If two biscuit on the pan, in depositing, get disarranged, they are spoiled; and if the inspector notices it, it is removed from the pan and put into wet feed. Farmers come to our feed house and buy what we call wet feed, with the moisture that would be in it, instead of going to the work of drying it out would come and buy it in wet feed. I imagine the wet feed is used for cattle and hogs. After the biscuit has been baked or toasted, there is sometimes some spoilage. Sometimes the tops of some of the biscuit might be too brittle or soft to stand shipping. Those biscuits would not be packed. They are taken and removed and we do not pack those biscuits. Some of them are given to the Salvation Army, to our welfare department, and as many as they can possibly use, and they are given over to welfare department work. We have tried the reprocessing the untoasted or unbaked shred or scrap but it did not prove satisfactory. In reprocessing the shreds after once going through the shredding mill, they are more doughy, making a harder shred than what went through the mill the first time, and also the shred loses the identity of the bran and the tender shred which is going through the first time, so that we have not reprocessed them. It makes a hard part in the biscuit if there would be very much of it.

I have three samples showing unbaked shredded scrap that has been reprocessed by going through the

mill. This one would be the shreds that go through the shredding mill the first time.

(Received and marked "Defendant's Exhibit No. 195 for Identification.")

THE WITNESS: This is shreds that have gone through the mills the second time.

(Received and marked "Defendant's Exhibit No. 196 for Identification.")

THE WITNESS: And these are shreds that have gone through the shredding mill for the third time.

(Received and marked "Defendant's Exhibit No. 197 for Identification.")

THE WITNESS: Referring to those three exhibits, there is a difference between the product for the various shredding operations. On the shreds going through for the first time, they are light, tender shreds, which bring out quite prominently the bran in it, and it is more or less of a loose shred, that is, the material. In the shreds that have been reprocessed the second time, it shows the more or less doughy effect that has been caused by going through the shreds the second time, showing that from reprocessing it brings out more of the doughy effect and that the bran is not as prominently shown in them as it was in the first.

On the reprocessing of the third time, it shows even more the evidence of a dough effect, and where it would have a tendency to curl up at the knives. There is quite a difference from what it is going through the first time.

(The three exhibits were received in evidence and marked respectively "Defendant's Exhibits Nos. 195, 196 and 197.")

THE WITNESS: I have made up some biscuit from the double processed shreds. I have a carton here of

those biscuits that were reprocessed where the shreds were put through the shredding mill the first time and then the second time, and that resulted in this biscuit. This carton contains 15 biscuits, the same as our regular carton, although it is not nearly full, and the biscuits are very firm and hard, instead of being more porous and puffed, as the regular biscuit; and in the oven where our regular biscuits are toasted in 45 minutes at 400 degrees temperature, these were in the oven at 400 degrees for one hour and thirty minutes.

It took more heat to toast them, and we left them in to try to get them to puff more, but on account of being reprocessed the second time, it was heavier and harder and more doughy like than going through the first time.

(Biscuit received in evidence and marked "Defendant's Exhibit No. 198.")

THE WITNESS: These 15 biscuits in Defendant's Exhibit No. 198 do not fill the package to the top. You can get three more in there. There is a space of about an inch down from the top that is empty, and that package weighs $19\frac{1}{2}$ ounces net where our regular package weighs $12\frac{1}{2}$. The extra space is due to the fact that the biscuits do not puff as much on account of the reprocessing. They have a tendency to be more doughy and a harder shred and the heat does not seem to penetrate as well as it does the first time. It is more doughy and harder. The more it is reprocessed, the more doughy it seems to get.

The biscuits in Defendant's Exhibit 198 were made by the same method as on the regular biscuit. They were put in on one of the perforated pans into the oven with the regular biscuit. I observed them at the end of the time necessary for baking regular biscuit, and they were still light colored, and they were not ready to come out, and we continued to let them revolve as

long as they could to see if they would puff any more than what they were, and when they get colored as much as we dared let them go, and not have them burned, we removed them from the oven. The only other difference in the processes from the regular standard biscuit was that the biscuits in Defendant's Exhibit 198 were put through the shredding roll twice and were in the toasting ovens for an hour and thirty minutes. If we had kept the defendant's standard biscuits in the oven for one hour and thirty minutes, they would be burned black because they would be beyond being able to be used. Forty-five minutes is about the limit that we toast our regular biscuit. In my opinion, double shredding of the biscuit makes a difference in the physical characteristics of the completed biscuit.

There is no spoilage or scrap due to the standard method of cutting the shreds. Our cutting belt registers with the lower receiving belt and we have no spoilage there. Then it carries it on over to the perforated pans to deposit it, and sometimes in depositing that there might be something break loose at the end and touch the ones below which displaces them or rolls them up, and those are the ones that we remove. There is no normal spoilage, it is all accidental.

In a biscuit like Defendant's Exhibit 240, the diamond-shaped biscuit, there would be a great deal more standard unavoidable amount of waste or uncooked scrap. I would say there would be half of the shreds which would go into scrap and would be cut out. I do not see how you could avoid the scrap in making those diamond-shaped biscuits.

In my judgment, there would be scrap in manufacturing biscuits like those in Plaintiff's Exhibit 243, and in 242 there would be more so in this side than in the previous one. With respect to Exhibit 245, I understood that is put down in a hollow tube then pressed down and removed in that way. As I said before, it

would be more. Instead of stretching your shreds like we do our biscuit, they would be just winding them down very similar to winding a rope. There would be not so much waste in that type as there would be in the others on account of being confined in that circular tube. In Exhibit 244, the biscuit appears to have been cut out of a form of some kind, and I would say there would be considerable spoilage to it.

In my judgment, there would be considerable spoilage with a biscuit of the shape of those in Exhibit 244. It seems to be such an irregular shape from what the others are. The spoilage would be in the cutting for one thing; and another thing, it would be more apt to break on this end in the handling.

As I said, the Kellogg Company does not reprocess scrap, if we did a second time, you certainly would have some of those which would probably go through a third or fourth time as you continued to use it. You could not say that it would just go through the second time; it would be very apt to go through the third or fourth time some portion of it. The more you get into it, the more the tendency would be to make a heavier biscuit because it would not puff as well as the biscuit would with the shreds just the first time. From our standpoint, the biscuit being open on either end and properly toasted and rising makes it a better biscuit to be eaten than though it had hard sides and had not stretched it properly toasted on the inside. A biscuit that is not open on the top and bottom does not get a chance for heat to penetrate the center. The welded ends are the least edible part of the biscuit. They are the hard part and the objectionable part. We try not to have any more than the minimum amount and also in stretching a biscuit when it is nipped off these cutters and stretching the shreds as tight as you can, when the heat does go in the oven, and they are open-ended, penetrating that it draws that biscuit in. That reduces

the welding edge to the minimum. That is why it is not so objectionable as it would be if it were on four sides or sharp.

The defendant's standard biscuit runs quite uniformly as to color. Sometimes, in the burners of our oven, it might possibly get blocked up, which would have a little tendency to make a white streak at the time, until we get an opportunity to redry them, and there are times when I have known what we have had what we call a flashy fire, which possibly the attendant might not turn down the burners while it was being loaded, and left them too high, which would have a tendency to toast the top as much as required, before the bottom might have been toasted as brown as we desire it, but our standard is toasted top and bottom, and there are very few instances that are that way. We have the inspection of the oven men, and then there are also the regular inspectors on the belt who inspect the biscuits before they go to the packing line, and there is also the regular inspector going through inspecting the biscuits on the rack.

I am familiar with the process used by the Kellogg Toasted Corn Flake Company in making toasted wheat biscuit from approximately 1912 until around 1918. In the processing of the biscuit made in 1912 until 1918, we used the white winter wheat. Instead of shredding the whole wheat as we do at the present time, it was ground into flour and this flour was put into a large D. mixer, a certain amount, and to that was added water, until it was mixed up into a dough, and this dough went down from the mixer into what we call a loaf-forming machine, which was a circular machine that formed the dough into loaves, and these loaves were removed and placed onto little buggies, there were 24 to each one, and two of these buggies were put into a steam cooker called a retort, and cooked for about 45 minutes in the steam, after which they were removed and the buggies

were placed on tracks which were on the floor of the room, and left to temper there in the open air for 24 hours, after which these loaves were put through a sort of a stone crusher or heavy machine, as the dough was very tough and ground into small particles, and these small particles were conveyed into our shredding rolls and the dough or fine ground-up dough was shredded into the shredded biscuit.

They were placed in pans which ran on the receiving belt below. These pans had the form of the biscuit. Onto them were placed a top which fastened over the top, converting the form of the entire biscuit, and they passed to a machine which gave a pressure of air and forced it down and cut and formed them and they were then allowed to go down and into a large chain oven we had with brackets on which allowed the chains to go into the heat and up to the top of the oven and they continued through a matter of about 18 minutes, when they were removed from the oven and the top taken off of the pan with a machine that lifted it off and the biscuits from the lower pan were dumped down to wire trays, placed in racks, and put into the evaporator and the moisture evaporated from them, after which they were taken to the packing room and packed in the cartons. That is practically the process.

We used the Whole Wheat and ground it into flour instead of at the present time we use the whole berry. That biscuit had a flavoring of salt and sugar; the loaves were broken up and shredded. I misspoke myself when I said our wheat bins had 5000 bushel capacity. I meant 500,000.

The wheat used in making the standard Kellogg biscuit is White Winter Wheat from Michigan. In previously saying Durum, I erred, as we used the soft winter wheat. It ~~was~~ a sprinkle of amber wheat that we used. The Durum is a hard winter Western wheat. In using that, I erred in saying that. We used a sprin-

kling of Durum and a soft winter wheat. Amber wheat is a Michigan wheat.

In the production of the regular Kellogg Shredded Wheat Biscuit, there have been times when it runs a little higher than 42 per cent. moisture. If it is much higher than 42 per cent., it makes a more brittle shred; also it makes soft tops in the finished biscuit so that if they are soft tops it does not permit packing them because they would not stand shipment.

We have experimented in trying to make identification marks on our biscuits, by putting bands on some with different materials. The biscuit in Defendant's Exhibit 199 were banded by shredding some rice into the center of the top of the biscuit and making a small ribbon there for identification. That is not a practical Shredded Wheat Biscuit of Whole Wheat because rice is added to it. It is not Whole Wheat biscuit. To my knowledge, it would not be a practical biscuit. It would be objectionable from the standpoint of the consumer not knowing what that form of material might be probably.

(The biscuits were received in evidence and marked "Defendant's Exhibit No. 199.")

With the biscuit in Exhibit No. 200, we took some green food coloring, similar to what they use in cakes, in food coloring, and took a small brush, and before the biscuit was put into the oven and toasted, we painted it across the center with a small brush in a food coloring—just a green food coloring. I do not know the consistency but it is what they use in the restaurants and bakeries in their cakes for coloring—what is commonly known as food coloring. In my opinion, that would not be a practical Shredded Whole Wheat biscuit on account of the material that was used, the consumer not knowing just what might be the green color.

(The biscuit was received in evidence and marked "Defendant's Exhibit No. 200.")

THE WITNESS: In the biscuit in No. 201, after the biscuit had been toasted and finished, we took a mould with a large K on it and had that put in to an electric soldering iron and heated, and then took the hot mould and pressed the K on to the outside of the biscuit—tried to make a K. It had a tendency of the shreds to stick to the hot mould when you would press on it, because it was necessary to press hard enough and leave it there long enough until it branded the letter K on it. It would not be a practical biscuit in my opinion for the reason I have already specified. It would be objectionable from the foreign material on top, where it is printed.

(The biscuit referred to was received in evidence and marked "Defendant's Exhibit No. 201.")

THE WITNESS: No. 202 was where we shredded some of the red food coloring on to the bottom mill to make a shred through there, and that is produced on the bottom of the biscuit before it went into the oven that was toasted, and when that came out, why, I would say that it would be very objectionable, from color. It looks as though it might be something that would not be acceptable as a biscuit. The biscuits in this box No. 202, in my opinion, are not practical Whole Wheat Biscuits.

(The box of biscuit was received in evidence and was marked "Defendant's Exhibit No. 202.")

THE WITNESS: In this one here Defendant's Exhibit No. 203, this one we used the little brush with the red coloring and placed it on the biscuit before it was toasted quite heavily, which made it a very pronounced objectionable color on the biscuit. I would say that they would not be practical for that reason. The putting on of the food coloring is the addition of a foreign material.

(The box of biscuit referred to was received in evidence and marked "Defendant's Exhibit No. 203.")

THE WITNESS: No. 204, we took before the biscuit was toasted, the green fruit coloring and with a little brush we just painted the edges of this mould, and then pressed it onto the white shreds and put it through the oven with the result that it came out showing a K more or less and green spots around, which would be objectionable on account of the foreign material that was used.. In my opinion, it is not a practical Shredded Wheat Biscuit.

(The biscuit was received in evidence and marked "Defendant's Exhibit No. 204.")

THE WITNESS: This one Exhibit 205 is where we put the green food coloring in the shreds on top of the biscuit where the one before was on the bottom, leaving a green stripe through there, which is objectionable on account of these foreign material. In my opinion these biscuit in 205 are not practical biscuit.

(The biscuit were received in evidence and marked "Defendant's Exhibit No. 205.")

THE WITNESS: Exhibit 206 which shows a letter K, we took the letter K, if I might be permitted, I might show you with the biscuit here—this is the biscuit before it has been toasted, after being formed, and with this biscuit here we took the large K and pressed them with this mold until we could make a mark on it. If you press it with an easy pressure it does not make a mark. It is necessary to press it quite hard. In that case it parts the biscuit. The biscuit has become a little dry and they have a tendency to tear. We took the letter K as it is here and with the biscuit as they came preparatory to going into the oven, we pressed each one of them and put them through the oven and

toasted them to bring the letter K out. The biscuit in No. 206 are not practical shredded wheat biscuit. There are two things objectionable to them. One is that they have not puffed up near as much as our regular biscuit on account of the pressure that you have to use on them, and it deforms the regular biscuit. The second objection is where that letter K is from pressing it down so far, it has made more hard substance in the biscuit which is objectionable.

(The biscuit was received in evidence and marked "Defendant's Exhibit No. 206.")

THE WITNESS: No. 207, we took some of our Krumble Wheat which we shredded for Krumbles and put that in the center of one of our biscuit shredding mills and shredded it over the top to make an identification mark, with the result that you see there. In my judgment they would not be practical biscuit on account of the looks of them which would be objectionable and the material not knowing what it would be.

(The biscuit was received in evidence and marked "Defendant's Exhibit No. 207.")

THE WITNESS: No. 208, I wish to say that we made biscuit with both this large K by pressing them as I showed you with the large K and also with the smaller one to see if we could have any better results, but the results were practically the same. It made the hard centers here, and also that biscuit is only about puffed half to what the regular biscuit is, so that those features would be objectionable. In my opinion, it is not a practical shredded wheat biscuit.

(The biscuit was received in evidence and marked "Defendant's Exhibit No. 208.")

CROSS-EXAMINATION.

By MR. COOPER:

XQ. 308. Mr. Penty, you have produced several of these biscuits with marks on them as to which you

said they would be objectionable because consumer would not know what the added material was. I want to ask you whether the name Kellogg and the reputation of Kellogg, together with an explanation, would not, in your opinion, satisfy the consumer that the materials were what Kellogg represented them to be?

A. We would not put out a product like that feeling that it would be objectionable to the consumer. As an experimental work, we brought that out, and we would not manufacture a product like it and send it out to the consumer.

XQ. 309. Well, what you said was that it would be objectionable, because the consumer would not know what the added material was. What I am asking is if Kellogg said, for example, that as an Exhibit 199, the bands that were added were of rice, would not that be sufficient in your opinion, with Kellogg's great name which has been so much testified to here, to satisfy the consumer?

A. Well, sir, as I say, our company would never pass on them as a merchantable product to send out, so I do not know what the consumer would say regarding that, on account as I know our company would not pass them out, as we feel from the standpoint of manufacturing they would be objectionable.

XQ. 310. Then your point is not that it would be objectionable to the consumer, but that it would be objectionable to pass them out?

A. Our company would not see fit to pass out any product like that.

THE WITNESS: Referring now to Plaintiff's Exhibit 240, the diamond-shaped biscuit and to a rough sketch which you have marked Exhibit A, a biscuit like that would be different than what it is on the present biscuit. It seems as though there would be more or less spoilage from that. I do not know as to whether that would work or not. I am not positive whether it

would work or not. I do not think it would be practical to turn the knife and let your biscuit material run longitudinally, like your sketch A, but I have never given any study to it, except as you just now put it to me.

With respect to sketch B, on the same sheet, assuming two knives, one of which went at right angles across the line of travel of the material and the other diagonally across, it might be possible to get a triangular biscuit without wastage with a hand mold, but from a practical standpoint of manufacturing the biscuit, I do not think it is practical. I did not understand Dr. Oakes to say that he could commercially produce both the triangular biscuit, and the diamond-shaped biscuit commercially from the moving mass of Shredded Wheat filament.

(The paper containing the sketches A and B was received in evidence and marked "Plaintiff's Exhibit No. 262.")

THE WITNESS: The 10 per cent. to which I testified, as being wheat other than Durum, is what we call red wheat; amber wheat is what we call it. There might be a small sprinkle of it but we use the white winter wheat and ask for the white winter wheat. Amber wheat is not a species of Durum wheat. Durum is a hard winter wheat, while amber is soft winter. It is practically considered a white wheat. It is in between a white wheat and a red wheat. I do not understand amber to be Durum wheat.

The material that comes off the machine due to partial spoilage before biscuits go into the oven, we call wet scrap and we do not reprocess it. I understood Dr. Oakes to say that they reprocess it in the center of the biscuit. I have never examined National Biscuit Company's biscuit to try to identify in the center of the biscuit some of these reprocessed filament. I have had them at home and have eaten them, but I never examined them from that standpoint in the factory.

I testified that some of our biscuits would be baked more on the top than on the bottom, and I meant by that that when the oven was loaded with biscuits there might be some of the burners on the bottom plugged which sometimes happens for a short time and that would necessarily allow the heat from the top burners to color the top biscuits faster than they would the bottom of the biscuits on the perforated pan, but at the same time when the top of the biscuits were sufficiently toasted it is necessary for the operator then to remove the biscuits or they would be spoiled. It has also happened where the top burners are also plugged. I would not say that biscuits differently baked top and bottom occur in as much as 25 per cent. of the cartons put out by our factory. I have no idea how many there would be. Our standard is to toast top and bottom.

Our biscuits are weighed previously to going into the oven because it is necessary to ascertain the weight at that time because after they are finished it is pretty late to change the weight, but we go according to the weight of our package. Our biscuits weigh finished seven-eighths of an ounce to sometimes an ounce. The biscuits are weighed in the cases after they are packed, but not after they have been weighed at the oven. After they are packed if they should run heavy or light, the light weight are set out and repacked and they notify the roll man as to it, but they weigh the biscuit, the biscuit before going to the oven approximately weighs an ounce and a half with the moisture and all, so that they try to hold their weight in that way as nearly as possible. The weight is mostly seven-eighths. Sometimes they run a trifle over, and sometimes they get a little heavy, but they weigh about $1\frac{1}{2}$ ounces net in a package, and they may vary in weight. There is very little variation in our regular output. Some of our packages may run a little over $1\frac{1}{2}$ ounces. If the biscuit weigh an ounce apiece, it would be 15 ounces, but

they do not run that unless there is something that happens and the dough might be a little wet, and we try to hold our mills down to get the weight, but our weight runs approximately 12½ ounces net to the package. We have some over-weights, but not much.

It is my understanding we sell some of our rejected wheat material to farmers. I know they frequently come up there and they do get, as far as I know, and buy what they call wet material, for hog feed principally, and instead of its being dried, why, it is dumped out of the truck or barrels right into their wagon, and it is generally lumped off to them. Some of this wet material may possibly be dried in driers, but not to my knowledge—sold as wet feed. I know nothing in regard to sales. I do not know as to the sale of rejected dry biscuit to fox farmers. I know our broken and rejected biscuits as long as they are good in all other ways, are given to the Salvation Army or welfare department and institutions of that nature.

With reference to the round biscuit in Exhibit 244, 245, and 242, I stated that they were not in my opinion practical. I am familiar with the product known as Muffets from seeing it, and while it may be a commercial article, from the standpoint of Shredded Wheat Biscuit, they do not compare. I have seen the article known as Rippled Wheat, and I do not consider it as a Shredded Wheat Biscuit. It may be an article that the manufacturers sell. The firm that manufactures it may be able to sell it for what it is called, but it would not compare with Shredded Wheat Biscuits. From its name I would say it was composed of ribbons instead of shreds. That is the appearance it gives me. I do not compare them with Shredded Wheat Biscuit.

I said that the exhibits that I made up would not be practical from the standpoint of a foreign material being in them, and for the objection from the way they

looked, and also some of them there are disfigured and hard in spots in the center, and in my opinion, it would not be practical to merchandise such a product as that. They would be objectionable to the consumer.

SEVENTH DAY.

June 1, 1933.

RE-DIRECT EXAMINATION.

By MR. CLARKE:

THE WITNESS: In my opinion, I would say that the diagonally cut diamond-shaped biscuit shown on the sketch A, Plaintiff's Exhibit 262, would not be a practical Shredded Wheat Biscuit. It would not pack in a carton similar to what we have now. It would be necessary to change the shape of the carton. I think there would be empty spaces in a rectangular carton. The end portions of the biscuit would not be as strong as the end portions of a pillow-shaped product. Where it would come to a point, a sharp point, that point would not be as strong as it would be where it is more uniform in a biscuit of this nature, and would have a little tendency to be harder on the point, and if there was much of it, the hard part is objectionable, as I stated before. I do not think it is practical to put the diagonal ends on the belt so as to make a biscuit like that shown in Plaintiff's Exhibit 262. I have never made any biscuit such as shown in A; Exhibit 262.

(A carton of biscuits was received and marked "Defendant's Exhibit No. 209 for Identification.")

THE WITNESS: The biscuit which you now show me I did not see until last night. In my judgment it is not a practical biscuit because it has the appearance of a distorted biscuit and the ends prove fragile, and

also it would be a difficult biscuit to pack on account of the shape. The sharp ends here are harder than the main part of the biscuit.

(Two packages were received and marked "Defendant's Exhibits 210 and 211 for Identification.")

THE WITNESS: The defendant's standard biscuit taken from one of those cartons, is in my opinion, a practical Shredded Wheat Biscuit. One of the plaintiff's large standard biscuit which you show me, is also a practical Shredded Wheat Biscuit. These biscuit are not of the same size. I know of no other way than that which the defendant has embodied in this small standard biscuit, namely, by using a smaller biscuit and a darker biscuit, by which the defendant company can produce and market a practical Shredded Wheat Biscuit which is distinguishable outside of the carton from that large light biscuit of the plaintiff's manufacture.

RE-CROSS-EXAMINATION.

By MR. COOPER:

THE WITNESS: During all the time that I have been connected with the Kellogg business, their goods have been put out in cartons, as far as I know. As far as I know, the cartons are designed with reference to the contents, and, if one wanted to pack biscuits of the diamond-shape such as has been shown to me, I do not think it would be practical to make a carton to take biscuits of that form. That is my opinion.

In making the biscuit twice processed, in Defendant's Exhibit 198, I was assisted by a young man in the experimental department. He and I were the only two that made it, and it was taken from the experiment room. We made it in the mill room and put it through our regular ovens where the regular produc-

tion is going on. The men up there saw the biscuits. It was put through a regular shredding machine of the same size as our regular mill, but in the experimental room. We have a regular shredding mill, equipped the same as in our mills in the line, in our experimental department, and we used a mold in making these biscuits. The second processing was in a separate shredding mill, not the one in our regular line of production. The whole wheat was put through this mill the first time, and the shreds taken that had gone through the first time, and put through the mill the second time, double-processing it and made this biscuit. The mill was not adjusted in any way between the first and second time. We made twenty-two shreds similar to running twenty-two mills on the regular line, by passing the mold back and forth under the mill and stretching the shreds similar to what we would in our regular line. I counted the shreds as I passed it under the mill going back and forth. I do not think you could count them accurately now, but I counted them as I was making them, twenty-two layers.

STANLEY B. HEARN.**DIRECT EXAMINATION.**

THE WITNESS: I am a grocer, doing business under the name, Hearn Brothers, and my brother and myself are the proprietors. We have sixty-two clerks regular and six extra on Fridays and Saturdays. The store is located at Concord Avenue and Washington Street, in Wilmington, and is a service store. About 60 per cent. of our orders come in by telephone and most of them are taken care of by girls. Some of the people ask for a certain man clerk. We handle two kinds of Shredded Wheat, in our store. They are known as National and Kellogg's. We have handled

Kellogg's Shredded Wheat approximately three years. I could not say there is any confusion in our store as between the two products. When Kellogg's Shredded Wheat first came on the market and we began selling it we had quite a few complaints, due to the fact that the people had always bought the National Shredded Wheat, which was known as Niagara at that time. As there were numerous occasions where a person asked for Shredded Wheat Biscuits and wanted Kellogg's, and they were given the Niagara, due to the fact that if you were to come into my store now and ask for a box of Shredded Wheat, it is probable that the clerk would hand you a box of National Shredded Wheat. In other words, we instructed our clerks that if a person asked for a box of Shredded Wheat to send them the National Shredded Wheat, but only send Kellogg's when they specified Kellogg's Shredded Wheat. If a customer asks for Kellogg's Shredded Wheat we give them Kellogg's Whole Wheat Biscuit and the name must be written out in full on the order.

We have had cases where Shredded Wheat has been ordered and National Shredded Wheat delivered where the customer has not taken it and has returned the product. I presume that after a person uses Kellogg's Shredded Wheat for a while they forget that it probably was Kellogg's and in ordering and re-ordering they would call up and ask for a box of Shredded Wheat and Shredded Wheat being marked on the order they would be sent a box of the National Shredded Wheat. And we have had cases where the customer sent it back and requested Kellogg's.

We sell probably 60 per cent. National and 40 per cent. Kellogg's in our store. There is a consumer demand for Kellogg's product. We do not substitute one product for another. We are so situated that we give the public what they want, that is, we try to carry

the better known and best advertised goods. In other words, if there were three or four more kinds of Shredded Wheat Biscuit, we would carry them, if there was a sale for them.

For instance, we carry twenty-three different kinds of package coffee. We try to give the customers what they demand. I think we have told the salesmen and other people that come there, that our service is to the public and not to the manufacturer. We carry six different kinds of whole wheat bread, known by the company that manufacturers them. The product of National or Kellogg Company is a Shredded Wheat Biscuit. It is a breakfast food. It is a Shredded Wheat Biscuit, both of them are known as that. The fact that the National Biscuit Company recently acquired the Shredded Wheat Biscuit Company or the Niagara Biscuit Company, there is not many of the public that really know it as National. While the clerks in the store know it, and know that it is the National Biscuit Company Shredded Wheat, I do not think the public in general knows that it is Nationally owned. The reason that we give out the National Shredded Wheat, whenever the public ask for a box of Shredded Wheat, is due to the fact that the public asks for a box of Shredded Wheat knowing that only as Shredded Wheat. They do not know it as National Shredded Wheat like they do Kellogg's Shredded Wheat. Instruction to the clerk were to ask which one they wanted, whether they wanted National or Kellogg.

As to whether the name Kellogg is of advantage to the grocer, I can only answer you that Kellogg's is a national advertised product. The majority of people buy by name as much as by anything else today. If it is Kellogg's, it must be good. If it is Heinz's, it must be good, and in merchandising Kellogg's Whole Wheat Biscuit, when we have a special

on it—for instance, have it advertised at a price—the fact that it is Kellogg's helps materially in selling the biscuit, because of the house behind it, you understand. People know that it must be good or it would not be Kellogg's.

We advertise Kellogg's Whole Wheat Biscuit and give it store and window displays. We have a local newspaper that we advertise in with a circulation of 5300, just in our section of the city.

CROSS-EXAMINATION.

THE WITNESS: We call both of the products Whole Wheat Biscuit. I would say that I recognize the name Whole Wheat as applied to the Kellogg product. It has been only within the last three years we have really sold most of Kellogg's Whole Wheat Biscuit. As far as we are concerned up to three years ago the only one I knew was the Shredded Wheat Biscuit of the Shredded Wheat Company at Niagara Falls—that is with Niagara Falls on the package. And if anybody telephoned to me then that they wanted Shredded Wheat I would invariably send them that product from the Shredded Wheat Company. My best recollection is that we have carried the Kellogg product about three years. When we started we probably had a special sale. We did not keep any records of it. The Kellogg people have always co-operated with us in stirring up interest in their product. I am not sure that I can recognize the package known as Plaintiff's Exhibit No. 2 to the interrogatories. Kellogg changes their packages very often, and while this (referring to Plaintiff's Exhibit 5 to Interrogatories) is the package they are putting out now I would not want to say that that was the particular package at that time. On Exhibit No. 2 of the interrogatories, the prominent words are "Shredded Biscuit," and they are much

more prominent than the words Whole Wheat. I cannot say that there in the beginning we were furnished with goods in the package that had Shredded and Biscuit on it in prominent type. We carry 2400 articles in our store.

Sometime after we began to handle the Kellogg product people who ordered from us would call for Shredded Wheat when they wanted Kellogg's, and we not knowing which they wanted would give them the Shredded Wheat Company product. That probably commenced about two years after we began to handle the Kellogg product. Our first order of the Kellogg product was probably one case, and it probably took a good while to dispose of that case.

CLARENCE L. JORDAN, recalled.

DIRECT EXAMINATION.

THE WITNESS: The biscuit in Defendant's Exhibit No. 200 has not got any consumer appeal with the green on it. It looks rather spoiled. 207 looks very much the same way. There is practically no appeal because that looks as though something foreign is in the biscuit. 204 is exactly the same with the green in there. As to No. 205, I do not think that any of these colors—they really spoil the eye appeal of the biscuit because it looks green and rather mildewy. No. 203 has another color and has the same objection; and so has 199 and 202. The biscuit in Defendant's Exhibit 201 looks burnt and has the same objection. The biscuit in Exhibit 208 looks squashed down from the sides. They are both the same way. They look squashed down and flattened out and have been very badly harmed.

I spent yesterday at the office going over the correspondence concerning which Mr. Cooper asked as

to the investigation. We seldom keep the individual reports of our studies, because our written records are the advertising copy. We simply walk out and talk to women about this type of biscuit to get their opinions regarding it and what they felt about it. We took that information that we got to write the advertising copy and that is our permanent record.

Looking at Defendant's Exhibits 210 and 211 for identification, the biscuit are not as attractive as the defendant's standard biscuit. It does not puff up as well. It does not look as crisp.

CROSS-EXAMINATION.

THE WITNESS: The reports that I said I did not have on file were the ones you asked me about concerning the study we made in 1927. So far as I know they have never been on file, but I cannot tell you because I do not remember. A great deal of that work was done through other of our offices across the country. The 6000 house-to-house study was not made in 1927, and I have already explained that on cross-examination. I do not know how many houses were visited in 1927.

(Two documents were marked for identification, "Plaintiff's Exhibits Nos. 263 and 264 for Identification.")

THE WITNESS: I recognize Plaintiff's Exhibit 263 which is a report of hot and cold cereals by the Curtis Publishing Company in 1931. That is a concern in Philadelphia that puts out the *Saturday Evening Post* and other periodicals. This report is well known. I cannot state how well recognized it is. We have used it as a basis of comparison.

The other document for identification, Plaintiff's Exhibit 264, purporting to be a report for a cereal survey from the *Chicago Evening American*, I do not

know whether I have ever seen that or not. I cannot identify it. Most of them are sent out by newspapers and I look at them, but I get hundreds of them, and when they come they are retained and used in our business, if needed.

RICHARD S. POOLE.**DIRECT EXAMINATION.**

THE WITNESS: I am assistant superintendent, in charge of production of the Kellogg Company, and started with the company in March, 1910, working on the packing room machinery, and I gradually worked up to having charge of one of the packing rooms. In 1914, I changed from the operating to the mechanical line. I then went into the designing of automatic machinery, and took over the supervision of the packing up until 1929, when we went on the six-hour shift. Then I took complete charge of production. In January, 1931, I was appointed assistant superintendent and still retained in charge of production. I have to do with the designing of several machines mostly in the packing line, and two in the biscuit pan machine, and there was a semi-automatic biscuit packing machine.

As production manager I am responsible for the cost of all of our labor and all of our products, and I have to arrange the production so that the sales requirements and the output of the plant will balance at the end of the month. Every month the sales department furnish us with a forecast as to their requirements for that month. It is the duty of our office to schedule our output, so that the even flow will meet the requirements as they are requested by the different branch managers in the field. I am entirely responsible for production costs.

Whenever there is a change suggested by the experimental department or any member of the executive staff, we are sent over the recommendation or a sample of the change that they anticipate making. It is our duty to make an investigation as to the machinery that could be used for the particular change, and submit facts regarding the actual production cost. Those facts are submitted through my superior, the general superintendent, to the board. They make the final decision as to whether it is practical with those facts.

In the past two or three years we have had samples submitted by the experimental department of biscuits having identification marks.

(Three packages were received and marked "Defendant's Exhibits Nos. 212, 213 and 214 for Identification.")

THE WITNESS: Defendant's Exhibit No. 212 for Identification represents a biscuit with a band or a piece of paper wrapped around it with the name Kellogg's on it. This was submitted to me and I was requested to give them figures regarding the cost of labor and material on this particular identification mark. The figure was 72 cents a case of 360 biscuit—72.3 cents a case. That would not be a practical expense to put on biscuits of this character. It would be prohibitive.

(The box received in evidence as "Defendant's Exhibit No. 212.")

THE WITNESS: This band is made of a bonded printed sheet around the biscuit and is sealed on the bottom. The best cost that we could get was a semi-automatic machine for that. The biscuits are so tender that it is impossible to get them in a magazine and feed them out without too much spoilage.

I was asked to work out costs on Defendant's Exhibit No. 213 for identification. That represents

biscuits with a tag tied around the biscuit with the name Kellogg's on it. This was presented to me and I went into the study of the possibility of getting a machine that would do this work. I found that at Blissville, Michigan. They made what is called the Saxmayer tier. The cost of this was prohibitive and the exact cost was 77.4 cents per case of 360 biscuits. They have an automatic machine so that the tags can be put on to a magazine and fed off at the ends just the same as a needle would be, and the tying of the string goes through the eye of the tag and ties automatically on the bottom of the biscuit. The biscuits are fed to the machine by hand.

(Received in evidence and marked "Defendant's Exhibit No. 213.")

THE WITNESS: Exhibit No. 214 for identification represents biscuits put in glassine envelopes. This was tried quite extensively by the Kellogg Company. They experimented with it a long time and they even used it for their sampling, distributing samples, but they found that the cost per 360 biscuit would be 59 cents a case, and of course it was given up, due to the fact that it was too expensive. Those biscuits are packed by hand, and there is a standard rate of 6½ cents a hundred.

(Received in evidence and marked "Defendant's Exhibit No. 214.")

THE WITNESS: Cellophane is more expensive than glassine, and this is a glassine wrapper. It is just the same as any envelope, a satchel bottom envelope, and the envelope is opened up and the biscuit is put in and the ends are twisted to hold it.

At the time they were experimenting with the marking of biscuits, I was asked to submit a preliminary cost on the marking on the biscuits, but we

found in making this survey that the cost would exceed 19 cents a case, and, therefore, we submitted those figures, 19 cents a case. Those are absolutely prohibitive figures.

The biscuit in Defendant's Exhibit 210 and 211 were made in a form. Those submitted by plaintiff had a diamond-shape biscuit, and of course I was asked to figure the cost of what were entailed in making those in our production line. Looking at them I wondered why they had submitted a biscuit, in that shape cutting so much waste.

Over the week end, in going down and looking their machine over, the thought came to me, would it be possible to obtain the same results, or as good by making a diagonal cutter on the line and having them just cut it out and make the big trim.

The Kellogg Company do not reprocess scrap, and it would be absolutely impossible to make a biscuit without having as much food as it would a regular biscuit going into the packages. I made up a form and made these biscuits from that form. They are absolutely not practical Shredded Wheat Biscuit, because it would be very difficult with the present machinery or with our present equipment it would be absolutely impossible to fit those knives in diagonally across the chain. It would be impossible to make a practical package to run on the machine and pack them, without putting in some waste or something that would be really prohibitive to take up the loose corners on the carton.

They also have a corner that is very tender—that is, it would break very easily, and by the cutting in a diagonal way as this is, it tends to push out on the corner and make objectionable pieces in the biscuit.

I would not submit that biscuit to the board for consideration. I have examined the samples of biscuit submitted on behalf of the plaintiff, for the pur-

pose of making a survey as to the extra cost involved in making similar shaped biscuits for the defendant. The cost of our packing for a triangular shaped biscuit like Exhibit 241, would be doubled, due to the fact that the girls on our semi-automatic machine sit along the line and put up units. It is a matter of units with them, and place them in the cartons. With this biscuit there would be twice as many units, or it would take twice the labor. There would also be an extra expense due to the spoilage in handling this biscuit from the cutter chain to the packing machine, due to this end which is not supported by enough material to really hold it.

Exhibit 240, which is known as the diamond shape with the shreds running lengthwise of the diamond on our machine, if it was possible to put our knives as they are, which I doubt very much, I would not want to attempt it myself. It would be a 50 per cent. wastage—that is in scrap material, which would go to feed, or if it was reprocessed, it would double our processing cost; just completely double it, due to the fact that the biscuits are put out in units, and if you had a hundred bushels of wheat, and you put it through, 50 of the bushels would have to be dropped to the side and reprocessed. Therefore, you would do just as much reprocessing as you did in the first place. After the 50 bushel was put through, you would have 25 and so on. It would completely double the cost. The packing would be a big problem, due to the triangular shape or the diamond shape, and it would be almost impossible to have a practical carton, without some stuffing or something that would be objectionable.

Exhibit 242, which is the round circular biscuit with a hole in, has a trim of 38 per cent. and, therefore, that biscuit would increase our processing cost 38 per cent. It would also be a bad biscuit to pack, due to the

tenderness of the biscuit, and that only the edges touch in the package in the shape, they would break up.

Exhibit 245 is the matted down biscuit that was made in the tube. This biscuit would be very difficult to make, due to the stopping and starting of the machine in making this mold. We have a continuous process that runs right straight along, and there is no stop and start to the chain itself. Therefore, this would involve a good deal of engineering and would be impractical from the continuous machine. As to packing, you would have the same difficulty in packing this into a carton; and for the proper protection for the edges, both to the outside of the carton and the biscuit in coming in contact with itself, there would be quite a little crumbling and spoilage.

When the defendant's biscuit is packed in cartons, it is held on four sides; and on the top and bottom we have a pad to protect the shreds and take the jar of shipment.

Exhibit 244 is the circular biscuit. This biscuit in the process would trim 27 per cent. of the finished biscuit. Therefore, it would increase our cost of processing immediately 27 per cent. The same difficulty would be experienced in the contact with the biscuit to the carton.

Exhibit 243 contains a round 3 inch biscuit which has a trim of practically the same percentage of the finished biscuit, and it would increase our cost just 27 per cent. of the process. In packing, you would experience the same difficulty. I do not regard any of the biscuits in Plaintiff's Exhibits 240 to 245 as practical Shredded Wheat Biscuit, and I would not submit any of those to the board for possible manufacture by the defendant company.

In my judgment, the most economical Shredded Whole Wheat Biscuit to make from the standpoint of factory cost is a biscuit without trim of uniform shape,

open on both ends so that the shreds are dropped into a trough, and you cut them in a parallel line. A uniform shape so that they will pack easily in a regular sized carton. The plaintiff's standard biscuit and the plaintiff's small size biscuit respond to the test as I have just defined it. The defendant company does not make any other size than the small size Whole Wheat Biscuit. And that standard size of defendant's biscuit also responds to the test. All of the biscuits, both plaintiff's and defendant's, are held on all four sides or edges when they are packed in cartons. I know of no other method or form of making a practical Shredded Whole Wheat Biscuit except the form adopted by the defendant in its standard small size biscuit, which would be distinguishable from plaintiff's large size biscuit outside of the carton.

If we were allowed to make a longer biscuit than we do, we would be able to put more tonnage through our machinery than is now possible due to the fact that the speed of the shreds going in the longitudinal direction is the bottle neck of the production. The biscuit is the unit of speed in the machine both on the pans and in the cutting chain.

CROSS-EXAMINATION.

By MR. COOPER:

THE WITNESS: The envelopes in Exhibit 214 were used for a period of three years in sampling only as an experiment. I cannot recall the exact date when the tags on Exhibit 213 were made. It was some time in the fall of 1932. Exhibit 212 is a biscuit with a band with the word Kellogg on it; that was around the same time that it was first talked of and the figures were submitted. Exhibits 210 and 211 were made over the last week-end. The form was made with the lines diagonally instead of straight across the line of the shred, and the shreds were put in there 22 thick or deep and

the forms pressed down, then they were put on the pans and into the oven. When I spoke of the paper on Exhibit 212 as a bonded paper, I used it for identification, just a common banding paper that will take ink. A bonded paper is one that will do a good job of printing on it.

When I was speaking of the extra expense in the production of the doughnut shape and round diamond shape biscuit in Plaintiff's Exhibits 240 to 245, I meant that we discussed the possibility of making a machine that would do it the best way—manufacture them the best way. We had this discussion over the week-end with counsel and with the engineering department. I arrived at the figure of 27 per cent. trim on the round biscuit by taking the area of the circumference or the diameter of a sphere of that size—a cylinder of that size, and subtracted that from the square that would be necessary to make that biscuit, and got my percentage in that way.

(A slip of paper was hereupon marked "Plaintiff's Exhibit No. 265 for Identification.")

THE WITNESS: The figures on Exhibit 265 for identification show a 100 per cent. biscuit. I said that the trim would be 27 per cent. of the finished biscuit, but with reference to the material there would only be a loss of 21½ per cent. approximately in the case of the round biscuit like 243, 244.

It is customary in the case of round cookies and round ginger snaps to pack them in appropriate cartons, but they are all of harder substance than the biscuit and are not as liable to break in shipping as the biscuit themselves. I have seen round cookies in cartons on the market for many years. I do not recall heart-shaped cakes, but there have been several different shapes.

Referring to my testimony about the part of the machinery which is the bottle-neck of production, I referred to the shreds of the wheat, as the experimental department have experimented to get the exact texture in the wheat by the cooking and the processing, the speed of this panning machine or the machine that shreds the wheat, puts it on the receiving chain, is all determined by the amount of stretch that the shreds will take. Therefore, the speed of the panning machine is determined by how fast or how slow they will be able to run, by the shreds of the wheat. The amount of strain that we can put on the shreds of wheat constitutes the bottle neck of the process because that governs the speed of the machine. I referred to it as the panning machine, and that is part of the unit; that is the bottle neck of the process. The fact of the matter is that it is all one machine connected up.

On Defendant's Exhibit No. 194, pictures Nos. 1, 2, 3, and 4 show the parts of the machine to which I refer. I refer to the panning machine as a complete machine in itself, it is all driven on the same motor connected with chains and positive drives to one complete driving unit. The photographs in Exhibit 194 are the only views we have of our panning machine. The Kellogg Company has more than one panning machine. They are both identical. A single panning machine feeds to several ovens. There are several ovens from our various panning machines, the pans with the biscuit on them are conveyed to the ovens in a single line. We have seven ovens. The belt that goes up to the ovens, the pans are fed on from both machines, one oven is filled at a time, and therefore there would be pans from both panning machines going to each oven when both panning machines run. If only a single panning machine is running, it would not be necessary to use seven

ovens. We never operate that way. The ovens are heated with gas and have no supply of steam.

I would say that the cost of the raw material, meaning wheat, would exceed 10 per cent.

The figure of 27 per cent. trim on the round biscuit which I gave with respect to Plaintiff's Exhibits 243 and 244 would amount to 9 cents per case of 360 biscuits. The figures I gave you dealt with labor only. As it has been before stated, we do not reprocess scrap. That would be an additional cost of the loss between the cost of the material put into the biscuit, the difference between the cost that is put into the finished biscuit and the price we would get for feed would be an additional expense per case. The figure of 9 cents per case dealt with labor only. The figure of 27 per cent. was all material. The material that goes into a case of 360 biscuits amounts to about 18 $\frac{3}{4}$ pounds raw material, approximately. The oven shown on photograph No. 8 of Defendant's Exhibit No. 194 is one of our regular commercial ovens, one of the seven that I talked about awhile ago.

RE-DIRECT EXAMINATION.

By MR. CLARKE:

THE WITNESS: The evaporators or driers in the defendant's process are heated by a bank of steam coils, the air being circulated through these coils making a change of air to take off the moisture. No moisture is introduced into the evaporating area from the steam coils. They are used to keep the evaporator at 210 degrees of heat, and the steam inside of the coil is segregated from the drying air outside.

On the conveyor that conveys the wheat from the tempering bins to the shredding rolls at the end of one of the conveyors there is a magnetic pulley, we term it as a trade name, the magnetic pulley. The wheat passes over this pulley, spread out thin so that if there is any

metal that is metallic in the wheat, it will be taken out at this point. That is before it goes to the shredders.

The figures per case that I gave on cross-examination were on a dry basis; and the normal moisture content of the wheat on an average would be about 12 per cent.

RE-CROSS-EXAMINATION.

By MR. COOPER:

This magnet was first introduced on our conveyor at the time we installed the equipment in the building that it is now located in. I could not say definitely the time. It has been there a good many years.

ROSS T. ADAMS.

DIRECT EXAMINATION.

THE WITNESS: I am vice-president in charge of purchases, secretary, and a director of Kellogg Company. I have been connected with the company since 1917, and during the first year or two, I held several minor positions around the office and in the factory, and in 1920 I was made purchasing agent. In 1925, I was elected a director of the company; in 1930, secretary; and about a year ago, vice-president in charge of purchases. I have general charge of purchases, as well as holding the other offices. I purchase wheat for Kellogg's Whole Wheat Biscuit. We do not buy any Durum wheat. We use only soft white winter wheat, from certain areas in Michigan. We purchase the wheat from certain locations, or certain counties, where the best varieties are grown. In other words, we aim to secure what might be termed almost strictly soft white winter wheat, comparatively free from amber wheat. Amber is a variety of white wheat which we have found does not process as satisfactorily as the

straight white wheat. We would see that white wheat would not exceed 10 or 15 per cent. of the amber variety. More than that would cause the wheat to be rejected. We do not use Durum wheat at all. It sells at a large discount under soft white winter wheat. Durum wheat is a strictly hard wheat, but it is not a soft wheat. There are two varieties; a red Durum and an amber Durum wheat.

I also purchase cartons and carton board for the defendant. On this chart, identified as Kellogg's cereal cartons, Kellogg's corn flake cartons A, B, and C have been on the market in substantially that same form since about the year 1906. Originally the product was called toasted corn flakes, later the name was changed to corn flakes. The cut of the product identified by carton D, individual size, has been on the market since about 1922. Kellogg's Whole Wheat Biscuit carton, both the regular and individual, has been on the market since about 1930, although the Shredded Whole Wheat carton, as identified by N, has been on the market in that or slightly different sized cartons since about the year 1912. That product is still on the market, regularly marketed by the defendant and shipped to various parts of the country. The old brown carton, identified by J, has been on the market for about ten years. The Wheat Krispies product, identified by N and P, is a comparatively new product with the Kellogg Company and has been on the market about one year. Cartons K and L represent the individual and standard size Whole Wheat Flakes carton, and that product has been on the market approximately two years. O and Q are Rice Krispies cartons, which product has been on the market for about five years. The same general design is carried out, although the colors may differ. For instance, Kellogg's has always appeared in large script in red, and Rice Krispies in pretty much the same form, but always the same color scheme has always been car-

ried out. Kellogg's standard colors are red, light green, and dark green.

The use of a representation of saucers and dishes is a common advertising process in connection with food packages. The Kellogg Company has made use of the saucer and dish, or saucer pictorial representation of the product for some years; and I know that a good many other concerns make use of similar illustrations on their cartons or containers or cans to identify their food products. For instance canned corn, canned peas, succotash, vegetables of many kinds, canned fish, etc. Many of them have a representation of the product on the label. Defendant's Exhibit No. 128 represents instances of food products employing the dish, with some of the contents. On the first page I notice labels of Lenox brand Spaghetti, Lenox Red Kidney Beans, Lenox June Peas, Spinach, Sliced Pineapple, etc. In every instance, the products are shown illustrated in a dish on these labelled products.

This is a chart headed "Kellogg's" and prepared under my direction. It contains in the upper left-hand corner a Kellogg's Whole Wheat Biscuit carton. Immediately on the right is a Kellogg's Shredded Whole Wheat Biscuit carton, and next are a series of four corrugated partition pads, such as are used to separate the layers of biscuits in the Kellogg Whole Wheat Biscuit and Kellogg Shredded Whole Wheat Biscuit cartons.

Next in line are six Kellogg's Shredded Whole Wheat Biscuits, three of them located in the exhibit with the tops exposed, and three with the bottoms exposed.

Below, under the title National Biscuit Company, there appears a Shredded Wheat carton such as used by the National Biscuit Company. Immediately to the right are three partition pads or partition cards, such as used to separate the layers of biscuits in the plain-

tiff's carton. Immediately to the right of the three partition cards is an exhibit showing three of the plaintiff's biscuits with the tops exposed, and under those three with the tops exposed, are three of the plaintiff's biscuits with the bottoms showing.

Referring to Defendant's Exhibit No. 215 for Identification, Kellogg's Whole Wheat Biscuit and Shredded Whole Wheat Biscuit cartons, as shown in the upper left-hand corner, are made from a No. 1 white patent coated newsboard with a green tinted back. This is a grade of board which at the present time sells for about forty-five to fifty dollars a ton.

The carton in the lower left-hand corner identified as a Shredded Wheat carton of the plaintiff's, is made from a bleached manila board ordinary news back. The present market on boards of that character is about thirty-eight to forty dollars a ton. Incidentally, the back of that carton, that Shredded Wheat carton, is made from ordinary news, whereas on the Kellogg's Shredded Wheat carton, the back is made from a white liner tinted to the shade of green as indicated in the specimen carton itself.

Getting to the matter of dividers as used on the Kellogg cartons, some two or three years ago it was found that some of the biscuits going to the trade were becoming broken. The Kellogg Company devised a new type of divider to eliminate so far as possible this breakage. The result is the corrugated divider as seen on this exhibit. It is made from pure bleached sulphide paper, which costs at the present time about \$90 a ton. This paper for these dividers is shipped to a firm at Monroe, Michigan, where it is corrugated on a B-Flute corrugator, the large rolls of corrugated stock are returned to the Kellogg Company, where they are cut into small pads on machinery which was developed in the Kellogg Company plant.

The dividers are then delivered from this machine in the form as seen on this exhibit. The corrugators cushion the biscuit. The nature of the corrugated pad is such that it allows for a cushion between the various layers of biscuit and the cartons will then stand considerable abuse without the biscuit becoming broken. No printed matter comes in contact with the biscuit in the defendant's container, but that is not true in the biscuit of the plaintiff's container.² In the partition pad used by plaintiff, the pads to start with are made from an ordinary news sheet, and by news sheet I mean that the sheet is made from old newspapers and the stock after having been cut into the size is printed and may be printed incidentally before being cut, and the present cost of newsboard such as used by the plaintiff, is approximately forty dollars a ton.

This is a shipping container identified as case 360, Kellogg's Whole Wheat Biscuit used for packaging 60 individual packages of Kellogg's Whole Wheat Biscuit.

(Received in evidence and marked "Defendant's Exhibit No. 217.")

This is a Kellogg's 324 Whole Wheat Biscuit container used for packaging twenty-four 12½ ounces of Kellogg's Whole Wheat Biscuit.

(Received in evidence and marked "Defendant's Exhibit No. 218.")

THE WITNESS: This is a window display put out by the National Biscuit Company and entitled "More Power to You. Shredded Wheat 12 big Biscuits."

(Received in evidence and marked "Defendant's Exhibit No. 219.")

THE WITNESS: I have here a No. 124 Kellogg's Corn Flake carton. On the front panel, below the leg-

and "Kellogg Company, Battle Creek, Michigan," appears the phrase: "Also makers of All-Bran, Pep Bran Flakes, Krumbles, Kellogg's Shredded Whole Wheat Biscuit." I have some half a dozen or more examples of other cartons of that same general type. They are regularly used or have been used in times past. The circulation on this particular carton, No. 124, has been in excess of 45,000,000.

(Received in evidence and marked "Defendant's Exhibit No. 220.")

THE WITNESS: This is a book prepared under my direction, and showing a series of photostat copies of magazine advertising such as put out by the Natural Food Company, Shredded Wheat Company and National Biscuit Company, during a period of some fifteen or more years.

I have here two photographs of stores. One is the Kroger store, Calumet Street, Battle Creek, Michigan; and the other the Central Grocery, Fort Wayne, Indiana. These photographs were taken under my supervision.

(Received in evidence and marked "Defendant's Exhibit No. 221.")

THE WITNESS: I have here three photostat copies of pages from the Denver Daily News, Denver, Colorado, July 17, 1895, July 10, 1895, July 27, 1895. In all three pages there appear advertisements under the item of Shredded Cocoanut, the advertisement being carried by Golden Eagle store.

MR. COOPER: Just to save the encumbering of the record with more exhibits, I will admit that the Golden Eagle store in Denver, Colorado, about July, 1895, advertised among the line of other goods an item Shredded Cocoanut.

THE WITNESS: I have here a letter from the National Biscuit Company, dated June 2, 1933, addressed to all jobbers and signed by C. K. Brace, Manager, National Biscuit Company, Denver, Colorado. I understand this letter was circulated to jobbers.

(Received in evidence and marked "Defendant's Exhibit No. 222.")

THE WITNESS: This is a chart of Kellogg's Shredded Wheat Biscuit cartons prepared under my direction. The various cartons included on this exhibit were used by either the Kellogg Company or its predecessor, the Kellogg Toasted Corn Flakes Company, from the year 1912 to the present time. The carton appearing in the upper left-hand corner was a carton used in 1912. These cartons were taken from the files of the Kellogg Company, and the information which I have indicates that the cartons—for instance, Exhibit A, were used during 1912, also Exhibit B; and Exhibit C in 1915. These are indicated by the regular record of the Kellogg Company. The next item D is a Kellogg Shredded Whole Wheat Biscuit carton, used in 1922. The next one, E, Kellogg's Shredded Whole Wheat Biscuit carton, used in 1927. F is a Kellogg's Shredded Whole Wheat Biscuit carton, also used in 1927. The carton identified by G was used in 1928. H is a Kellogg's Shredded Whole Wheat Biscuit carton being used at the present time. J, Kellogg's Whole Wheat Biscuit carton, was used during 1930. I is being used at the present time, as well as the carton identified by the letter K. On the extreme right-hand side, we have a sample of Kellogg's Wheat Biscuit cartons being used about 1912, and below the sample cartons are three individual Kellogg's Shredded Whole Wheat biscuit, the Kellogg's Whole Wheat Biscuit cartons used during 1928 to the present time.

The carton identified by the letter H is the one that is still in use by the defendant company.

(Received in evidence and marked "Defendant's Exhibit No. 223.")

THE WITNESS: The standard biscuit of the defendant is the fragile biscuit, and the cushion carton helps materially in eliminating breakage to the biscuit. On the plaintiff's carton, the phrase "Handle with Care" appears four times on the carton, twice on the top and twice on the bottom.

I have here a carton known as Kellogg's Shredded Krumbles sample carton, which was used in the year 1921; also one of the standard size net weight 8 ounces used during 1921; and a third specimen, net weight 8 ounces, used during 1919.

(Received in evidence and marked "Defendant's Exhibit No. 224.")

THE WITNESS: I have an advertisement of the plaintiff from a Detroit paper called *Trade*, April 9, 1913. It reads "Made at Niagara Falls. Look for the picture of Niagara Falls on the end of the carton when you buy Shredded Wheat Biscuit. Any other Shredded Wheat that may be offered you is merely a poor imitation of the only original Shredded Wheat, the kind your customers have always bought, the kind that stands up in the market, always clean, always pure, always the same. Made only at Niagara Falls, New York, in the cleanest, finest food factory in the world."

(Advertisement of *Chicago Daily Tribune*, June, 1928, received in evidence and marked "Defendant's Exhibit No. 225.")

MR. COOPER: The *Battle Creek Evening Journal* of September 21st, seems to contain an advertisement of Kroger's store, which contains among other things listed, this statement: "Shredded

Wheat, Kellogg's or Niagara, Pkg.," which I suppose is meant for package, "10 cents." Is that the concession you want?

MR. CLARKE: Yes.

MR. COOPER: All right. That of course is not from us, but from a local dealer.

MR. CLARKE: Yes, all right. With the concession I will not have to burden the record with this piece.

MR. COOPER: I can make a concession now. The advertisement, that counsel tendered to me from the *Battle Creek Moon Journal* of Thursday, May 25, 1922, the duplicate of that is a part of Plaintiff's Exhibit 110, so if counsel wants to offer this separately, I will concede that this is just as good as the one that is in Plaintiff's Exhibit 110.

THE COURT: Admitted.

(Received in evidence and marked "Defendant's Exhibit No. 226.")

MR. CLARKE: I offer in evidence this letter—open letter, addressed to "Dear Madam," on the letterhead of National Biscuit Company, Uneeda Bakers, 449 West 14th Street, New York, The Bakers of Shredded Wheat:

"Dear Madam:

"Please accept with our compliments this sample package of Shredded Wheat Biscuit. You will enjoy it with milk or cream, berries, peaches, bananas or any other fresh or preserved fruits.

"Shredded Wheat is the whole wheat—nothing added, nothing taken away. It contains proteins to build muscle, vitamins for health, and the proper proportion of bran which Nature provided.

"There is scarcely a breakfast table in the country on which this famous energy food does not

appear. Perhaps Shredded Wheat is already your chosen breakfast dish. If not, we hope that this sample may prove to you the deliciousness of Shredded Wheat.

"Your grocer sells Shredded Wheat. (Look for Niagara Falls on the package.) Twelve full-sized biscuits in the package; a serving costs but a few pennies.

"Sincerely yours,

"NATIONAL BISCUIT COMPANY."

And the postscript is:

"We invite you to visit the Home of Shredded Wheat, either at Niagara Falls, or at Oakland, Calif. Your trip through the bright, clean bakeries will be an interesting experience, and competent guides will show you how the plump, sun-ripened whole wheat grain is steam-cooked, drawn into filmy, porous shreds and baked into crisp, nutritious Shredded Wheat Biscuit. Bring your friends with you. A treat is in store for you."

(Received in evidence and marked "Defendant's Exhibit No. 227.")

MR. CLARKE: I offer in evidence this complimentary sample carton of Shredded Wheat.

(Received in evidence and marked "Defendant's Exhibit No. 228.")

MR. CLARKE: I offer in evidence this pamphlet, "Fifty Ways of Serving Shredded Wheat," "Including the Dishes That Won the Gold Prizes."

(Received in evidence and marked "Defendant's Exhibit No. 229.")

(Another pamphlet of the plaintiff received in evidence and marked "Defendant's Exhibit No. 230.")

THE WITNESS: The Kellogg Company sells a product known as Battle Creek Shredded Wheat. I have one of the cartons for that product and produce it. It is marketed only in small amounts throughout the country for the purpose of maintaining our trade-mark and is marked "Battle Creek Shredded Wheat."

(Received in evidence and marked "Defendant's Exhibit No. 231.")

THE WITNESS: We have been putting out Battle Creek Shredded Wheat cartons for possibly two years. And we have a trade-mark, "Battle Creek Shredded Wheat," registered in the Patent Office February 11, 1930, and from approximately that date to the present time we have been putting out Battle Creek Shredded Wheat in small quantities.

(Received in evidence and marked "Defendant's Exhibit No. 232.")

(An exception was reserved and allowed to the plaintiff upon the reception of Defendant's Exhibits Nos. 231 and 232.)

THE WITNESS: From the year 1906, the inception of the Kellogg Toasted Corn Flake Company, through the years and including advertising and sampling of the Kellogg Company from 1922 to the present time, the company has expended in excess of fifty-one million dollars for advertising and samples. These figures do not include any expenses of salesmen or branch offices.

(Article in *Chambers Journal* for January 27, 1900, received in evidence and marked "Defendant's Exhibit No. 233.")

MR. CLARKE: If your Honor please, this is a transcript of record of appeal in the Court of Appeals of the District of Columbia, Patent Appeal Docket No. 455, Natural Food Company, appellant v. William E. Williams. The decision in this case

is reported in 30 Appeals, D. C., and has been referred to in the opening argument.

MR. COOPER: We tendered the depositions taken in the Connecticut case, and they were ruled out on your objection. Now you tender evidence in another case, and I object on a like ground.

THE COURT: Your objection is sustained.

MR. CLARKE: May I have an exception, if your Honor please?

THE COURT: Certainly.

(Certified copy of proceedings in the matter of registration of the trade-mark Shredded Wheat by Shredded Wheat Company, January 15, 1924, No. 178,725; received in evidence and marked "Defendant's Exhibit No. 234.")

(Certified copy of proceedings in the matter of application for registration No. 213,456, issued to plaintiff on May 25, 1926, received in evidence and marked "Defendant's Exhibit No. 235.")

MR. CLARKE: The registrations contained in this book, are brought together under one head. Plaintiff has offered two of them, and I will make the same offer with regard to all of them. The registrations are numbered as follows:

No. 52,858, dated May 22, 1906, and issued to the Natural Food Company, on biscuit and crackers, showing the Ceres Goddess.

Registration No. 85,186, issued January 30, 1912, to the Shredded Wheat Company, the statement containing the following:

"No claim being made to the representation of a Shredded Wheat biscuit."

The trade-mark illustrated is a saucer with cream and one biscuit in the saucer.

I also offer Registration No. 89,071, issued to Shredded Wheat Company, registered November 5, 1912. The trade-mark represented is a pictorial representation of the manufacturing plant of Shredded Wheat Company at Niagara Falls.

I also offer the Registration No. 178,725, issued January 15, 1924, to Shredded Wheat Company under the Act of March 19, 1920, the three preceding registrations having been under the Act of 1905, and this Registration No. 178,725 specifies that the alleged trade-mark on which registration is solicited, are the words "Shredded Wheat for use on biscuit or crackers in Class 46, Foods and Ingredients of Foods."

I also offer Registration No. 213,456, issued May 25, 1926, to Shredded Wheat Company, on the alleged trade-mark "Shredded Wheat for use on biscuits, crackers and cereal foods, cooked or prepared for consumption in Class 46, Foods and Ingredients of Foods."

The registration states that applicant is the owner of trade-mark registration No. 178,725, granted January 15, 1924, which has been previously offered.

I also offer Registration No. 216,593, issued August 17, 1926, to Shredded Wheat Company of Niagara Falls, under the Act of February 20, 1905, showing a representation of a saucer containing two Shredded Wheat biscuits. It is stated, "For use of biscuits, crackers and cereal foods, cooked or prepared for human consumption."

I offer those registrations in this book as one exhibit.

MR. COOPER: I understood it was so offered. I have no objection.

(Received in evidence and marked "Defendant's Exhibit No. 236.")

MR. CLARKE: I will offer as one exhibit this bundle of correspondence conceded by my friends to be true copies of correspondence, including a letter from A. J. Porter, President, Shredded Wheat Company, dated January 19, 1922, to Kellogg Toasted Corn Flake Company of Battle Creek, Michigan; a letter dated January 25, 1922, to the Shredded Wheat Company of Buffalo, New York, marked for the attention of Mr. A. J. Porter, President, signed Creighton Clarke, W. H. Creighton Clarke, attorney for the defendant; a letter to the Kellogg Company dated April 8, 1927, signed by Breed, Abbott & Morgan, who were attorneys for the Shredded Wheat Company at that time; a letter on the letterhead of W. H. Creighton Clarke to Messrs. Breed, Abbott & Morgan, dated April 22, 1927; also a letter to Creighton Clarke from Breed, Abbott & Morgan, dated May 10, 1927, and a letter from Creighton Clarke to Breed, Abbott & Morgan, dated May 16, 1927, and I ask that that go in as one exhibit.

(Received in evidence and marked "Defendant's Exhibit No. 237.")

THE WITNESS: I have here a specimen of shredded paper put out by the Pioneer Paper Stock Company of Chicago, Illinois. One is white, and the other is green colored. This is largely used for packing purposes, etc. I have a similar specimen of shredded cellophane which comes, according to this exhibit, in several colors, made by E. W. Twitchell, Inc., Philadelphia. I have also a package of Chalmers' Shredded Gelatine, which is sold in grocery stores; and a sample, No. 151, of Shredded Gelatine, which was secured from the Hughes Gelatin Company, Detroit, Michigan.

(Received in evidence and marked "Defendant's Exhibit No. 238.")

THE WITNESS: Defendant's Exhibit No. 146 is a package or carton of Kellogg's Shredded Whole Wheat Biscuit, which was taken from the laboratory of the Kellogg Company at Battle Creek, Michigan. It is in the carton of the Toasted Corn Flake Company, and the carton was used in the year 1922.

The Kellogg Sales Company is a selling organization for the Kellogg Company.

This is a shredded dough biscuit, made in the laboratory of the Kellogg Company, on my direction, and represents substantially the same type of Shredded Whole Wheat Biscuit that was put out by the Kellogg Toasted Corn Flake Company, prior to the year 1920. It is substantially correct as to size and dimensions, and I have seen some of the biscuits myself.

MR. CLARKE: I offer that in evidence. It does not purport to be an original biscuit, if your Honor please. I want the record to show that it is reproduction. May I have that banded and labelled.

(Received in evidence and marked "Defendant's Exhibit No. 239.")

THE WITNESS: I am a director of the defendant company, and am familiar with these exhibits, Plaintiff's Exhibits Nos. 240 to 245, inclusive. I have examined them here in the court room, and, as a member of the board of the Kellogg Company, would not consider them as practical biscuits to be marketed by the defendant company. I would not submit any of them to the board for possible marketing.

The biscuit in Defendant's Exhibit No. 206, 202, 203, 204, 200, 208, 201, 199, 205 and 207 are, in my opinion, not practical as I do not believe they could be merchandised under the Kellogg label successfully. I would not submit any of them to the board for possible manufacture.

The corn flakes and other cereal foods of the defendant company are not marked, so as to distinguish the Kellogg Company when served outside of the carton. The nature of the product is such that they would not lend themselves to being marked. I do not know of any other way than that which the defendant company has adopted, that is the making of a small biscuit and a dark biscuit that would produce a practical Shredded Wheat Biscuit, which would be distinguishable outside of its carton from the biscuit of the plaintiff's manufacture.

Defendant's Exhibits 210 and 211 I would not consider practical Shredded Wheat Biscuits, and I would not submit them to the board for possible manufacture by the defendant.

MR. CLARKE: I will ask to have this copy of the transcript of the record in this Williams against Natural Food Company marked for identification.

(The same was marked "Defendant's Exhibit G for identification.")

THE WITNESS: I produce three specimens of other products marketed with cellophane fronts. No. 1 is Golden Harvest Lima Beans, in which there is a cellophane window front and plainly shows the contents of the carton to be lima beans. I also have a Golden Harvest Quick Fire Pop Corn with a cellophane window front; and the pop corn is very readily seen. As a third exhibit, I have a pack of Sunnyfield Yellow Split Peas with a cellophane window front, and the split peas are also plainly visible.

(The three packages were received in evidence and marked respectively "Defendant's Exhibits Nos. 240, 240A and 240B.")

THE WITNESS: I have some knowledge regarding the development of cellophane in wrapping goods and

in windows in packages. As a matter of fact, the du Pont Company has on many occasions contacted with Kellogg organization, attempting to interest them in the use of cellophane for wrapping their cartons, and also for use as window frames in their various lines of cartons. They have submitted proofs indicating that certain commodities, food commodities and food products, and so forth, that the sales had increased from 25 to 1000 per cent. with the use of cellophane as a wrapper. The use of cellophane wrapper has helped the sale of Kellogg's Whole Wheat Biscuit. The cellophane front has materially aided the sales.

The Kellogg Company has some scrap and broken biscuit. There is the first known as the wet waste feed, that is normally sold to farmers that come in every day or two and haul it off in that condition. It is wet feed which is sold in that form principally for hogs. The second line of feed is that of the Shredded Biscuits after they have gone through the oven, and also through the evaporator. Some biscuits become damaged and they are not of the Kellogg quality and they cannot be packed. These biscuits, some of them, are given away or sold to local institutions, and the balance are sold to fox feeders. It seems that Shredded Whole Wheat Biscuits are very valuable to feeders of Silver Gray fox, and so forth. I understand it helps the fur. The biscuits that go to the asylums and similar institutions are ones that are thoroughly clean, that have not come in contact with the floor and really are edible, with the exception that they may be a bit distorted in shape or something of that kind. The biscuits that go to the fox feeders are biscuits that have been on the floor and become otherwise contaminated very slightly.

MR. CLARKE: I have certain issues here of the *Grocery World* for 1903. My friends do not object to the manner of the proof, but I think to the materiality, and

I just want to substitute these photostat copies for page 4 of the issue of *Grocery World*, Philadelphia, Pennsylvania, October 26, 1903, including that photo of French Java coffee held in a cup marked "Trademark."

MR. VILAS: I make no point of the form but I object to the offer as immaterial and irrelevant. It is a picture of a package of French Java coffee, is that right?

THE COURT: The point being that the advertisement is in the saucer?

MR. VILAS: The picture is holding a small cup in his hand.

THE COURT: I thought he was drinking from a saucer.

MR. CLARKE: I do not think this is a very serious issue in the case. I offer that all as one exhibit from the *Grocery World*, Philadelphia, Pennsylvania, November 2, 1903, I offer a photostat of page 13. And from the same publication of November 23, 1903, I offer page 16; and from the Christmas number, December 1903, Volume 17, No. 24 of the *Grocery World*, I offer the inside of the cover page, and from the same volume, Christmas number, December 1903, page 59. Each of these illustrates a figure of a food package, either holding a saucer or cup.

THE COURT: They are all admitted.

MR. VILAS: May I have an exception?

THE COURT: Certainly.

(Received in evidence and marked "Defendant's Exhibit No. 241.")

MR. CLARKE: This book of patents, issued to the Shredded Wheat Company, I will offer this in evidence

as one exhibit, and I will ask the reporter to copy the individual numbers of the patents in the books, together with the additional numbers.

(Received in evidence and marked "Defendant's Exhibit No. 242," and will be found at the end of today's proceedings.)

MR. CLARKE: My friends direct my attention to one patent of R. E. Valentine, No. 831,909, that neither of us is prepared to say at the moment whether it is a Kellogg patent or one of plaintiff's. I will offer that separately. I understand there is no objection to that. That is No. 831,909. This is the book.

(Received in evidence and marked "Defendant's Exhibit No. 243," and will be found at the end of today's proceedings.)

MR. CLARKE: This is a book of patents on Shredded Wheat machinery and Shredded Wheat Products, issued to the Kellogg Company or its predecessor, Kellogg Toasted Corn Flake Company. I offer that as one exhibit, and will ask the reporter to copy those individual numbers into the record.

(Received in evidence and marked "Defendant's Exhibit No. 244," and will be found at the end of today's proceedings.)

MR. CLARKE: My friends have offered to furnish me with numbers of additional Perky patents. They are not in this first volume, and I ask to have those offered in evidence just as if they were physically produced here. I will supply them in a few days' time and add them to this exhibit. I would like to make the offer as if they were physically in court at the present time. They are furnishing the numbers.

I will offer as one book of patents this set of miscellaneous patents on Shredded Wheat machinery and Shredded Wheat products, issued to others than either

to the plaintiff or the defendant, and ask that that be marked as one exhibit.

THE COURT: The tender of the miscellaneous patents is admitted.

(Received in evidence and marked "Defendant's Exhibit No. 245," and will be found at the end of today's proceedings.)

CROSS-EXAMINATION.

THE WITNESS: These particular copies of patents were not taken from the Kellogg Company's files. The original patents, however, are in our files. I have examined these patents, and I have noticed the very last one issued to a man named Williams, No. 1,263,009, on a method of marking articles of the Shredded Cereal Biscuit type. Its apparent purpose is to mark a wheat biscuit with some identifying means upon the biscuit itself. I have read the patent and know substantially the process that is suggested by it. It is a method of injecting a strip of colored shreds into the center of the biscuit longitudinally with the shreds of the biscuit proper. The identifying band, I, is obtained by baking along the line of that band I, so that the shreds along that line get to be a deeper color or a different color, so that that will be a mark which will stay on permanently up to the time of consumption. I recall having seen the patent, but that particular item in my memory is not exactly clear. That is my general understanding of it.

Defendant's Exhibit No. 239 is a biscuit recently made up under my direction to represent the product of the Kellogg Company in the dough biscuit, made prior to 1920. That is supposed to represent the biscuit shown on Defendant's Exhibit 145. Exhibit 145 fairly accurately represents my recollection of the appearance of that biscuit. Of course that is many years

ago, and I could not testify as to the exact size of it, although from my recollection, the size of the biscuit which we have identified by No. 239, is about the same size that we manufactured at that date. If the cereal bowl and saucer are correctly depicted on Exhibit 145, I would say that the biscuit there are a little longer than the biscuit in Exhibit 239; and there is a difference in the coloring. The color on 145 is much browner than on 239. I think that may be explained perhaps by the fact that this is a laboratory experiment and a biscuit not made in the regular production.

The Whole Wheat Biscuit is the only carton on which we now put cellophane. I believe it has materially helped the sale of Shredded Whole Wheat Biscuit, and the representation of the duPont people was that its use would greatly promote the sale of the Kellogg Company's products.

Referring to Defendant's Exhibit 231, the pasters bearing the printing "Battle Creek Shredded Wheat," are pasted over the words on the carton itself, "Whole Wheat Biscuit." I am unable to state the exact quantity of these cartons that have been put out. We had put them out from month to month in small quantities, a few cases, one or two or more. We probably put out not to exceed half a dozen in any one month. I would say that we have put out as many as three in one month.

XQ. 145. Is it your purpose in putting this paster on the cartons like 231 to represent that to the public as your trade-mark, the words "Battle Creek Shredded Wheat"?

A. Yes, it is.

THE WITNESS. There is a trade-mark registration notice on the carton in the lower right-hand corner front panel, and that was on the carton as it was originally before this paster was put on. I do not

recall off-hand what trade-mark or trade-marks registered in the United States Patent Office are referred to by the notation to which you have called my attention on Exhibit 231. I do not think there is any trade-mark on Whole Wheat Biscuit. I believe Kellogg's description of registered is a trade-mark in the United States Patent Office, and that is the only one I can see without further examination.

In 1912 I was going to school. There is nothing on board Exhibit No. 216 that was put out by the Kellogg Company in 1912. If I was taken by the reporter as having said that carton N on Exhibit 216 has been in use in that or different time since 1912, that is a mistake which I now rectify. In 1912 we did use a Kellogg's Wheat Biscuit carton of a different size, but of somewhat the same design.

XQ. 159. But it is not correct, is it, to state that the Shredded Whole Wheat carton as identified by N on this Exhibit 216, has been on the market in that or a slightly different size carton since about the year 1912?

A. I think the different size covers the answer, and I refer to Exhibit B, or carton B on Exhibit 223.

THE WITNESS: Carton B on Exhibit 223 is what I say was put out in the year 1912. Carton N on Exhibit 216, or one quite similar to it, was put out in the year 1922. According to the answers to the interrogatories, Plaintiff's Exhibit 3 to the interrogatories was the one put out in 1928, and proof of that is the fact that we have a 1928 label on the carton which I believe to be identical with that identified by G on Exhibit 223.

HAROLD F. MUNTZ (Recalled).

DIRECT EXAMINATION.

THE WITNESS: I produce photostatic copies of additional institution bids. The first one is a photostatic copy of the bid placed by National Biscuit Company with the purchasing officer of the Department of the Interior at Washington, D. C., which was opened on May 13, 1933, on the second sheet, which is the reverse side of the first sheet, under Item 56-G-590, The National Biscuit Company has filled in as one item, a summary of the items on which they are bidding the following:

"Original Shredded Wheat, 36, 12-ounce packages to type 1 or 2 carton, 1,072 cases."

Indicating under the quantity 28,944 pounds and the unit price .1222 and the total price \$3536.96.

The next sheet is a reproduction of the sheet on which Item No. 56-G-590 is listed as 1072 cases of biscuits, Whole Wheat, Shredded, over which the National Biscuit Company has filled in the words "Original Shredded Wheat."

It is stated "To meet Federal Specifications NC 191 as described in paragraph E 2 H thereof." The original paper as it was received from the Department of the Interior called for twenty-four 12½-ounce packages or thirty-six 12-ounce packages. The National Biscuit Company has typed out the twenty-four ½-ounce packages indicating that they are offering to supply the thirty-six 12-ounce packages.

(Received in evidence and marked "Defendant's Exhibit No. 246.")

THE WITNESS: The next one is a proposal or a bid or copy of a bid placed by National Biscuit Company with the United States Marine Corps at Washington, D. C., on December 14, 1932.

Under Item No. 7 for delivery to Quantico, Virginia, it calls for Shredded Wheat, thirty-six 12-ounce packages to case to be in accordance with Federal Specifications No. N C 191, 75 cases.

There is a space for which the brand is to be indicated and the National Biscuit Company has indicated that they are bidding on N. B. C. brand.

Q. 3. They filled that in, that was filled in?

A. That was filled in by the National Biscuit Company as is clearly shown in the difference in type on these sheets.

Under Item No. 14 for delivery to the United States Marine Corps at Quantico, Virginia, it calls for Shredded Wheat, thirty-six 12-ounce packages to case to be in accordance with Federal Specifications No. N C 191. The National Biscuit Company has indicated N. B. C. brand, which is filled in by the National Biscuit Company.

Q. 4. The three letters N. B. C. and the word "Brand"?

A. Yes. Under Item 28 it calls for Wheat Shredded thirty-six 12½-ounce packages to case to be N. B. C. The "To be N. B. C." was on the proposal when it was received from the Government indicating that that is the only item they want. The Federal specification is not referred to in this particular item which shows that that is a resale item for commissary stock.

Q. 5. And that would be one of the items which the Kellogg Company would not bid on, as I understand?

A. That is right.

(Received in evidence and marked "Defendant's Exhibit No. 247.")

THE WITNESS: This next one is a bid placed by the National Biscuit Company with the United States

Marine Corps on March 21, 1933, and under Item 7 calls for Shredded Wheat, thirty-six 12-ounce packages to case to be in accordance with Federal Specification N C 191. The National Biscuit Company has filled in N. B. C. brand and their price.

Item No. 7 was for delivery to Quantico, Virginia.

Item No. 12 calls for delivery to Norfolk, Virginia, Shredded Wheat, thirty-six 12½-ounce packages to be in accordance with the Federal Specification N C 191. The National Biscuit Company has filled in N. B. C. brand.

Item No. 36 calls for Shredded Wheat, thirty-six 12-ounce packages to case to be N. B. C. The "N. B. C." was on the proposal at the time it was received from the Government.

A. That is for resale to the families at the Government Reservation.

(Received in evidence and marked "Defendant's Exhibit No. 248.")

THE WITNESS: The plaintiff requested us to produce a copy of our bid placed with the Post Quartermaster at the Marine Barracks, Naval Ammunition Depot, Dover, New Jersey, and I have here a copy of that bid.

It shows that the bid was opened on February 15, 1933, and under Item No. 45, calls for Shredded Wheat 12½-ounce Specification N C 191, 48 packages. The Kellogg Company filled in the name of our product, Kellogg's Whole Wheat Biscuits, 12½-ounce.

And the price.

(Received in evidence and marked "Defendant's Exhibit No. 249.")

CROSS-EXAMINATION.

THE WITNESS: My statement in regard to all these exhibits that the National Biscuit Company has filled

in certain information is because I have seen the original placed by the National Biscuit Company in the Department of the Interior, as you can see clearly by the difference in type on the sheet. I draw the conclusion that the National Biscuit Company put that in because it also corresponds with the prices that are filled in figures the price of the National Biscuit Company. The Kellogg Company bid on Item No. 7, calling for Shredded Wheat, 36 12-ounce packages to the case, to be in accordance with the Federal Specification N C 191. The word "Brand" was a part of the bid received from the Government, and the Kellogg Company bid on that, filling in the name Kellogg Whole Wheat Biscuit under the space provided for brand. The Kellogg Company does not furnish its biscuit in thirty-six 12-ounce packages to the case, but bid on twenty-four 12½-ounce packages. The Kellogg Company obtained the award on this particular Item 7 for twenty-four 12½-ounce packages to the case.

On Exhibit 247, Item 7, the wording is the same as on the previous exhibit, Shredded Wheat, thirty-six 12-ounce packages to the case, and the blank for the brand filled in in another typewriter is N. B. C. and the bid. The Kellogg Company also bid on Item 7 in this instance, offering to supply Kellogg's Whole Wheat Biscuit. The contract was awarded to the Kellogg Company from that bid. The Government accepted the award on twenty-four 12½-ounce packages, and adjusted the quantity accordingly so that they got the number of packages or the total net weight desired. The Kellogg Company also bid on Item 14 on the same exhibit and was also awarded the contract.

On Exhibit 248, Item 36, Shredded Wheat, thirty-six 12-ounce packages to the case, N. B. C., the sheet is marked with a circle around the price of \$3.30 a case, which is an indication that the award was made to the National Biscuit Company. That is the item I

said the Kellogg Company did not bid on because it said to be N. B. C.

Exhibit 246, Item 56-G 590, is the exhibit in which I say the words "Original Shredded Wheat" were written in by National Biscuit Company. When it was received from the Government, there was nothing on that sheet. This second sheet is the reverse side of the first sheet, and there is nothing on that when it is received from the Government. The words "24 12½-ounce packages to the case" were crossed out by National Biscuit Company. I draw that conclusion because I saw the original bid placed by the Biscuit Company. No award has been made as yet on that contract. The bid is just opened on the 18th and the award will not be made for possibly another three or four weeks.

Exhibit 249, Item 45, was received by the Kellogg Company, as you see it here, with the exception of the written in part. Item 45 calls for Shredded Wheat, 12-ounce, Specification NC-191, 48 packages. The Kellogg Company filled in, as you see right here, the name of its product "Kellogg's Whole Wheat Biscuit, 12½ ounces" and filled in our price. The contract was awarded to the Kellogg Company.

OTIS K. BERRY (Recalled).

DIRECT EXAMINATION.

THE WITNESS: I saw these Marine Corps bids of National Biscuit Company at Washington. These two bids referred to as Defendant's Exhibits 247 and 248 are the two that I saw in Washington as placed by the National Biscuit Company. Item No. 7, calling for Shredded Wheat, 36, 12-ounce packages to the case, to be in cartons for Federal Specifications No. NC-191, N. B. C. brand had been filled in by National Biscuit

Company, and the price was \$3.30, unit price, and total of \$247.50. Also Item No. 14, Shredded Wheat, 36, 12-ounce packages to the case, to be in accordance with Federal Specifications No. NC-191, brand, N. B. C. and the unit price \$3.30, total \$33. The last N. B. C. brand and the price had been filled in. N. B. C. refers to National Biscuit Company products.

Exhibit 248, Item No. 7, Shredded Wheat, 36, 12-ounce packages to the case to be in accordance with Federal Specifications No. NC-191, brand, N. B. C., was filled in by National Biscuit Company, unit price \$3.30, total \$148.50. The words filled in were "N. B. C. brand" and the unit and total price. Item No. 12, Shredded Wheat, 36, 12-ounce packages to the case, etc., was filled in by National Biscuit Company, N. B. C. brand, unit price \$3.30 a case, total \$33. I saw the original bids.

CROSS-EXAMINATION.

I think it is usual for the original bids to be shown to contractors. I go there for the purpose of keeping posted on all bids, and on this occasion went on instructions of Mr. Clarke. When I say so readily that the bid has been filled in by National Biscuit Company I mean that I saw the original but I did not see National Biscuit Company write it in.

(Pages 1254 to 1257, stenographer's minutes omitted. These pages consist of a list of patents put in by the defendant as Exhibits Nos. 242, 243, and 244.)

EIGHTH DAY, JUNE 2, 1933.

ROSS T. ADAMS (Recalled).

CROSS-EXAMINATION (Continued).

THE WITNESS: I am not familiar with Plaintiff's Exhibit No. 264 for identification, which purports to be a report or analysis by the *Chicago American*. I have heard of the Curtis Survey, but I am not familiar with this particular document.

(Advertisement of the Natural Food Company in *New York Daily Tribune*, dated May 12, 1907, received in evidence and marked "Defendant's Exhibit No. 250.")

MR. CLARKE: Mr. Savage or Mr. Cooper, how about this advertisement *Trade Detroit*? Mr. Savage said they found some evidence of the cut and arrangement.

MR. COOPER: We can not identify that in any way but still I am not inclined to raise any objection about it and it may go in evidence as though it had been proved that it was an advertisement emanating from the Shredded Wheat Company.

MR. CLARKE: Of Niagara Falls, New York?

MR. COOPER: Yes.

MR. CLARKE: I offer that in evidence.

(Received in evidence and marked "Defendant's Exhibit No. 251.")

RE-DIRECT EXAMINATION.

THE WITNESS: These little packages you show me I purchased this morning at the drug store in the duPont-Biltmore Hotel.

RDQ. 168. What is the material on the end; is that glassine or cellophane?

A. It appears to be cellophane.

MR. CLARKE: I will offer those in evidence as three exhibits.

(The package of Arrowroot received in evidence and marked "Defendant's Exhibit No. 252.")

(The package of Fig Newtons received in evidence and marked "Defendant's Exhibit No. 253.")

(The package of Hydrox received in evidence and marked "Defendant's Exhibit No. 254.")

MR. CLARKE: If the Court please, this certified copy of the Articles of Incorporation of the Shredded Wheat Company, or a certified copy, or an exact duplicate of this certified copy, was offered at the depositions at Colorado, but the original exhibit seems to have been misplaced. I am making this offer to have a duplicate of this exhibit under a new number.

MR. VILAS: No objection.

(Received in evidence and marked "Defendant's Exhibit No. 255.")

THE WITNESS: In my opinion, the biscuit marked as described in Patent No. 1,263,009, by running in some coloring matter, does not represent a practical Shredded Wheat biscuit; and I would not submit such a biscuit to my board for possible manufacture by the defendant company.

It would not be possible to use the cellophane window on other cartons of the defendant company for other products for the reason that the cereals in the Kellogg line such as Corn Flakes, bran, etc., are in a

waxed paper inner bag; and if a cellophane window front were used the contents of the package would not be exposed to the public. The Whole Wheat Biscuit carton has no waxed liner.

I have here a package of No. 136 size Kellogg's Corn Flakes, showing the waxed paper inner bag within the carton. It would be necessary to put cellophane windows in both the carton and the liner, in order to get the transparent effect. The same condition exists on all standard line regular size packages. These other products are very susceptible to moisture, and it is necessary that a wax liner be used in order to exclude the moisture from the packages so as to keep the contents fresh.

(Received in evidence and marked "Defendant's Exhibit No. 256.")

THE WITNESS: In our estimation, the Kellogg package is much more up to date than the plaintiff's package. I do not think it would be possible to make a practical carton for the diagonal shaped biscuit. I do not think grocers would receive the carton with any degree of welcome, because the cartons would be an entirely different shape than the standard size cartons used to package other cereals and other commodities, and at the moment I cannot think of any triangular shaped cartons which are on the market today. There is no question but that a carton with diagonal ends would require different arrangement for packing in the packing case. The Kellogg Company does not market any package foods in cartons not of substantially rectangular outline.

(Sketch, exhibited to the witness Oakes, marked for identification as Defendant's Exhibit A for identification, received in evidence and marked "Defendant's Exhibit No. 257-A.")

(Defendant's Exhibits Nos. 210 and 211 marked previously for identification received in evidence as "Defendant's Exhibits Nos 210 and 211.")

(Chart containing the current carton of the plaintiff and two current individual cartons, large size individual and small size individual, and small size Triscuit received in evidence and marked "Defendant's Exhibit No. 258.")

RE-CROSS-EXAMINATION.

THE WITNESS: There are two grades of cellophane, one is moisture proof and the other is not. One common usage of cellophane today is for cigars. That grade of cellophane could be substituted for the waxed paper in the containers which I have testified about and that would be transparent, and if it were substituted for wax paper, and a window cut in the carton, the contents would be visible.

It might be possible to develop a different shaped package from a triangular shaped package which would be somewhat practical, but I do not believe it would be as practical as a rectangular shaped carton. Most food products lend themselves to being packed conveniently and satisfactorily in a rectangular carton, and the rectangular carton will set on a grocer's shelf conveniently without loss of space. I believe that a carton must be a rectangular shape in order to be practical for grocers as a container of food products.

RE-DIRECT EXAMINATION.

THE WITNESS: It would be impractical to substitute for the wax liner a liner made entirely of cellophane for the reason that cellophane is several times as expensive as wax paper; and if a complete inner liner were made of cellophane instead of wax paper, the cost would be almost prohibitive.

RE-CROSS-EXAMINATION.

THE WITNESS: I have not up to the minute quotations, but if I remember correctly, the last figure on moisture-proof cellophane was something like 60 cents a pound. That was a couple of months or more ago, but I would say the price is about the same today. I am not sure of the quantity on which that figure was made, nor of the thickness of the cellophane.

RE-DIRECT EXAMINATION.

THE WITNESS: There would be a slight additional cost involved in cutting off the outside of the carton in order to insert cellophane windows and to let a cellophane liner show through the carton.

GILBERT G. WAGNER.

Deposition taken at San Francisco, California,
February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am an advertising man, connected with Associated Newspaper Color. I know Mr. Warner as a business acquaintance, and Mr. West is a little more than a business acquaintance. I have no interest either with either National Biscuit Company or the Kellogg Company. I am a user of shredded wheat, both the National Shredded Wheat and Kellogg's Whole Wheat Biscuit. I have known Shredded Wheat twenty years, I should say. During that time, I have known where the product was made. I believe the original company was in Niagara Falls, and I think they were manufactured in Oakland, also. They have a plant here.

I have been familiar with advertising of Shredded Wheat Biscuit. Niagara Falls is on the outside of the

package. They advertise extensively. I do not recall if Niagara Falls has been associated with their advertising, aside from the package.

I have been familiar with Kellogg's Whole Wheat Biscuit about two years. I am a user of that product, and have been off and on since that time. I first became acquainted with it through sampling, I believe. The samples were consumed. I believe I got the first sample through Mr. West, about two years ago. We had samples which we consumed, and we also purchased them at San Mateo. I cannot recall whether Kellogg ever ran a campaign on their Whole Wheat Biscuit or not. We have received samples of all kinds of products. I have seen other samples, besides those Mr. West gave me, either through picking them up at his office or I have seen them.

I have purchased both products. We have been a consumer of the Kellogg product off and on for two years. We distinguish the two products. The package is different entirely. When you ask for the Kellogg product, you usually say Kellogg's Whole Wheat Biscuit. When you ask for the Niagara Falls product, you usually classify it as Shredded Wheat. By shredded wheat or shredded whole wheat biscuit, I understand is meant a prepared cereal wheat biscuit. It is a biscuit, made out of wheat, shredded and baked, I imagine. I am not familiar with the manufacturing process of either product. The size of the Kellogg biscuits is different. I think there would be a little difference in the taste. Kellogg's product is a little bit crisper. Fifteen of the Kellogg's come to the package, and I think there are twelve of Shredded Wheat.

I have purchased the Kellogg biscuit in grocery stores, but not in restaurants. It is carried by grocery stores I am familiar with. I have not made a check-up on the various stores that carry it. I am familiar with some stores in San Mateo that carry the product.

CROSS-EXAMINATION.

THE WITNESS: I think the earliest time I became familiar with Niagara Falls Shredded Wheat was at least twenty years ago, just as a consumer. I knew it then as Shredded Wheat. As long as I can remember, Shredded Wheat, with its pillow shape, has always been the same size and had the same appearance. Up to two years ago when I became acquainted with Kellogg's Whole Wheat Biscuit, I never saw or heard of any other food product called Shredded Wheat. I am a consumer of both products and I happen at this time to have them both in my home at the same time. I board. I am a single man. Shredded Wheat or Kellogg's biscuit at my place of residence is served to me two biscuit or one on a plate or saucer. I know them apart and am able to tell which it is that is being served to me, because one is of different size than the other. It is hard to say whether you can tell them apart by the taste. If they were laid down side by side, you could tell the difference. One is usually a little lighter in color. Not paying particular attention, if a couple of biscuit were served me in a dish, I think I would notice whether it was Kellogg's biscuit or Shredded Wheat, from my knowledge of the circumstances.

I am connected with Associated Newspaper Color, Inc., an advertising agency. My concern carries advertising for the Kellogg Company, but does not run any for the National Biscuit Company at the present time. I came here to testify at the request of Mr. West. We were talking. He asked me if I could tell the difference between a package of Shredded Wheat and a package of Whole Wheat Biscuit. I said I thought I could. He asked if I would be willing to make a statement to that effect, and I said yes.

RE-DIRECT EXAMINATION.

I have heard of shredded cocoanut and shredded soap. I do not believe I have heard of shredded codfish.

STANLEY M. WEST.

Deposition taken at San Francisco, California,
February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am Stanley M. West; age, 42; residence, Burlingame, California. I am district sales manager, Kellogg Sales Company, and I have been connected with them approximately seventeen years, during which time I was formerly assistant district manager in southern California, in Los Angeles; for the past seven years, district sales manager in San Francisco, my duties being supervising sales, advertising, and general salesman and advertising activities in California, Nevada, and Yuma County, Arizona, which constitute my territory.

I am familiar with the product known as Kellogg's Whole Wheat Biscuit, formerly known as Kellogg's Shredded Whole Wheat Biscuit. Our cartons are now marked Kellogg's Whole Wheat Biscuit. The merchandise we have in this territory now does not carry the word shredded as part of the trade name. Kellogg's Whole Wheat Biscuit have been distributed in my territory, I would say, about three years, and the distribution during that time has been under my direction and control as district sales manager.

We have used various promotion methods, including house-to-house sampling in some districts, newspaper advertising, store demonstrations. When it comes to getting actual distribution in the retail store and restaurant, our general plan is to have our salesmen take orders through jobbers, also go to the jobbers and purchase a certain amount of stock and resell it to the grocer. In that way we find they are able to get a quicker distribution, and we are sure the grocer has it; whereas, sometimes, jobbers do not always fill or-

ders promptly. We have also done canvassing, where the crew manager goes to the grocer and purchases stock, selling it to the housewife, as a means of introducing the product to the housewife.

Kellogg's Whole Wheat Biscuit has been advertised in our district. We have done quite a bit of newspaper advertising and house-to-house sampling, which is, of course, a form of advertising. There is a very good distribution in my district of Kellogg's Whole Wheat Biscuit. Possibly some of the stores carry our biscuit exclusively. The majority carry both products. I might add that the National biscuit probably has a better distribution than we. Our distribution is somewhat spotted. In some sections, we have nearly all stores carrying our product; in others it is not so good. It depends somewhat upon our consumer demand. In some sections, it is much stronger than in others.

There is no question that there is consumer demand for Kellogg's Whole Wheat Biscuit. We have found that many consumers ask for it by the full name. They are gradually learning to specify Whole Wheat Biscuit. In all cases, as far as I know, the name Kellogg is associated with the product.

We have very good distribution in the restaurants. It is difficult to say what percentage, because there are very small restaurants, hardly classifiable as restaurants, and some that carry no breakfast foods whatsoever. The majority of restaurants which carry, say, half a dozen products, will make one of them Kellogg's biscuit. They are packaged in small individual packages, containing two biscuit. That is the way practically all restaurants sell it. Personally, I know no restaurant using our large package. I believe at least 99 per cent. of our restaurant biscuit business is in individual packages, almost universal.

That opinion is based on my personal experience in this district and personal check-up of our salesmen,

by making calls myself on restaurants and retail stores. I have about twenty salesmen in my district. They are working the whole district uniformly and constantly. In restaurants, it is an almost universal practice to serve the biscuit in the carton. Some will place it right in the bowl and let the consumers open it themselves. The majority will bring it in the bowl, set it down on the table, and the serving person will open the package at the top with a knife. The consumer takes the biscuit out of the package himself. In this district, there are a number of jobbers serving nothing but restaurant, hotel, and institution trade. Most of the larger jobbers serve some restaurants and hotels. Most of the business is serviced through special jobbers.

The policy of the Kellogg Company is to push the sale of its biscuit in the individual cartons to the restaurant and hotel trade. We will not permit our salesmen to take an order for the regular-sized package from a restaurant. I believe most of the better class restaurants handle our biscuits and that we have better than a 50 per cent. distribution.

I believe the practice of substitution in the grocery trade is on the decrease. I do not think it is possible for the manufacturer, the wholesale distributor, or the retail distributor to build real business through substitution. By *substitution* I mean filling an order with one product when another product is called for. If the consumer knows she is not getting the product she asked for, that would not exactly be substitution but selling her something else. Substitution, as far as the consumer is concerned, is filling her order with a product similar to the one called for, in such a manner she does not know she is getting a different product.

If a consumer asked for Royal Baking Powder and got baking powder not Royal but she thought it was, I would call that substitution. If she asked for Royal Baking Powder and received Davis' Baking Powder, I

would call that substitution, also. The consumer, after seeing the package, would know she was not getting Royal and could send it back; but there is no question in my mind that there was a substitution on her original order.

On an over-the-counter sale, if the grocer said he would like to recommend Davis' instead because it had certain qualities better suited for her purpose, that would not be substitution. It would be switching the customer from one product to another. That practice is indulged in where the grocer wants to introduce a new product. Quite frequently, a grocer will have a particular interest in a product that he is anxious to have his customers try. When the customer asks for a similar product, it is not at all uncommon for the grocer to suggest another product.

Kellogg's Whole Wheat Biscuit in my district are distributed generally through the whole class of stores, chain stores, independent stores, self-service stores. A self-service store is one where the consumers go to the shelf, help themselves, and have the merchandise checked out at the cashier's counter. They pick up the package, and the sale is not influenced in any way, shape or form, by the clerk. Our best business has been built with that type of store. We have a very good general distribution of Whole Wheat Biscuit in them.

We have practically 100 per cent. jobber distribution of Whole Wheat Biscuit. All jobbers carrying our general line carry our biscuit. Chain stores, as a rule, do not carry our entire line. The wholesale grocer, distributing to independent retail or voluntary-chain stores usually carries all our products, both large and individual sizes, Corn Flakes, Pep Bran Flakes, Whole Wheat Biscuit, Krumbles, Rice Krispies, Bran Flakes, All-Bran, Kaffee Hag Coffee. Except one bran flake which is packed in a brown or yellowish package for distinguishing purposes, all our cereal products are

dressed in a generally similar type of package, with the familiar red-and-green colors. The jobbers in my district generally carry both the Niagara Falls and Kellogg's Biscuit. I believe, in the last two or three years, there has been a change in the methods of distribution of the National or Niagara Falls biscuit, as relates to jobbers. I understand the National Biscuit Company sell through jobbers and also sell some goods direct to the retail stores. I have not made a very close check on it; but I guess they still distribute more through jobbers in this district than direct to grocers.

Many of the retailers or distributors in my district feature our biscuits in their own advertising, in which Kellogg's name is practically always used. Where it is not used, the biscuit is advertised as Whole Wheat Biscuit.

I think Muffets and Triscuit are both in competition with Shredded Wheat Biscuit. Other wheat products, such as Wheaties and Wheat Flakes, or any wheat breakfast food, in fact, practically any ready-to-serve breakfast food would furnish competition with them. Wheaties had a very good sale in some sections, and they have been very highly advertised.

We do sell individual Kellogg's Whole Wheat Biscuit to dining cars or railroad services in this district for service in the dining cars or their lunch rooms or their various types of eating places. We have some distribution in this district of Kellogg's Whole Wheat Biscuit in that class of dining cars and restaurants, not what would be called universal distribution, at all. With one of the largest roads, it is an optional item. The dining car steward does not have to carry it but can order it from the commissary if he has demand on his particular run. For instance, between here and Los Angeles some cars carry certain products that are not carried on runs to the east. That is true of not

only our products but a good many others. The commissaries carry compulsory items that they have to carry on every dinner. There are a few other items that the steward can order, if he so desires. That applies to their lunch rooms, ferry service, and various other types of service. Kellogg's biscuit is in that category.

Practically 100 per cent. of jobbers who handle our full line, handle the Whole Wheat Biscuit. By full line jobbers, I mean that there are some types of jobbers who cater to a class of trade not providing outlets for every item we make. Others we classify as wholesalers, like chain stores, are sold direct and do not carry our full line. The jobber customers or direct customers with a general wholesale grocery business all carry our Whole Wheat Biscuit. Some of them have salesmen to the trade, and some sell on a cash-and-carry basis, where the grocer goes in, picks out his merchandise, and pays the cashier.

Display advertising is distributed through our salesmen, as a general rule. They always carry a supply of display cards and dealer helps or store helps right in their cars. They will usually have a few cards in their hand when they call on the dealer. I do not believe business in a product like shredded wheat, either Kellogg's or the National would continue in its present volume if advertising were discontinued. I have charge of demonstration crews when they are put on. We have used demonstration crews in selling Kellogg's Whole Wheat Biscuit in this district, both in stores in house-to-house calling.

Our regular salesman holds Saturday demonstrations. The usual procedure is a table display of our products, laying particular stress on the product we are pushing at the time. Packages are opened and they occasionally sample the customer directly out of the package. Part of the time they will serve the product they are demonstrating, with sugar and cream.

The regular demonstrators that do nothing but demonstrate serve at all times. If the customer desires to taste it, they will try to serve them with sugar and cream. Once in a while, a customer will pick up a biscuit and say, "I would just like to try it this way."

The canvassing method is to go to the house, ring the bell, and show the housewife the biscuit by carrying a package in the hand, from which the front part has been cut on three sides, so the package can be readily shown and the merchandise displayed. He will call the consumer's attention to the various points we think are particularly meritorious, the size biscuit to fit the bowl, toasted on both sides, and crisp. They introduce themselves as a representative of the Kellogg Company, something like this:

"I represent the Kellogg Company. We are introducing Whole Wheat Biscuit in this territory. I would like to show you how this product looks. Opening the package, you will notice the biscuits are somewhat smaller in size than the ordinary biscuit of this type and it is toasted on both sides. We have a very definite purpose in making them a little bit smaller, as we feel they fit the dish more conveniently. By toasting on both sides, the flavor is brought out in the more distinctive manner. Another point is we pack fifteen biscuit in every package; so, in serving children for breakfast, you get fifteen servings from every package. To introduce them in this market, we are taking orders through your regular grocer at a special price. We are selling for the benefit of your local grocer. The merchandise I have with me was purchased from your local grocer, and we are reselling to you for his account."

If a purchase is made, the demonstrator asks the name of the grocer from whom they usually purchase, so he can give him credit for the sale. That is the gen-

eral procedure, but it may vary, depending on questions asked by the consumer.

CROSS-EXAMINATION.

THE WITNESS: The demonstration I have just given you comprises the instructions given to our demonstrators or samplers. I myself went around and gave that talk to housewives, when we were doing that type of work. It has been my experience that the best way to get a crew started is actually to work with them on a few calls, to make a few calls personally, if possible, to get the consumer reaction and find out if there are any angles whereby you can improve the sales talk. I absolutely have personal knowledge about what I have been telling you about the practice in the field and demonstrating.

I think about two years ago we did the first house-to-house work on Whole Wheat Biscuit. It may possibly have been as long as three years ago. It has been made for longer than that, five or six years, anyway, to my knowledge. Without consulting records, I would hesitate to state exactly how long. Before they called it Whole Wheat Biscuit, they called it Shredded Whole Wheat Biscuit. I recognize the cartons, Plaintiff's Exhibits 165, 166, 167, and 168. I have participated in the distribution of both of those Mr. Vilas is holding in his hand. I recognize both of them. Plaintiff's Exhibits 165 and 166, each of which bears the legend "Kellogg's Shredded Whole Wheat Biscuit," have been sold by me in the California market, while I was here, approximately three or four years ago. The smaller package, Plaintiff's Exhibit 166, which stands on end, was the first package, stating "net weight, nine ounces," containing twelve biscuit. Plaintiff's Exhibit 165 followed that, and contained fifteen biscuit. As far as I know, that was used

up to the time the word *shredded* was taken out of the product name and it was called Kellogg's Whole Wheat Biscuit. Prior to two and a half or three years ago, the product we were selling here was in cartons which called it Shredded Whole Wheat Biscuit. It actually sold as shredded wheat.

Plaintiff's Exhibit 168, with a window in it, was introduced about May of 1932. Biscuit in packages like that were sold in cases. We had some cases packed with only one display package in the case, that is, a package with the cellophane window in it. When we first developed the window package, we put only one in a case. Later, we developed a stronger container in which we found we could ship twelve, or even twenty-four.

Plaintiff's Exhibit 167 happens to be a later package than the one we have just been talking about. The design has been slightly changed; in that the outer margin or line around the outer edge of the package has been left off, and other slight changes. I notice now that there is a difference in the appearance of the biscuit in the dish, although I did not notice that before. The particular difference, as I see it, is in the dish and not the biscuit. That package came out in about October of 1932. I could not say, without getting the other package whether that was the first package which contained on the ends "a shredded wheat product," and "shredded wheat in its most delicious form." I do not see it on Plaintiff's Exhibit 168. This says "Whole wheat shreds," also "Kellogg's Shredded Whole Wheat Biscuit," on the end of the package. I do not see on it the words you quoted, immediately under the product name on the end panel. To be perfectly frank with you, I do not know whether that matter was on any other package or not. I never happened to notice it, even on this package. Quite frequently there are slight changes in our packages.

It would not be called to my attention. That is particularly true of the small print on the ends of the packages.

Plaintiff's Exhibit 167 is the package currently in use now, although we have that same type package with the cellophane window in it on one side; but, to the best of my knowledge, there has been no change in the package since Plaintiff's Exhibit 167 came out, that I know of, with the exception of there being a window in some of them. All the demonstrators or samplers I use are direct employees of the Kellogg Company. We have employed outside distributors to distribute samples, but not to do demonstration or sales work. To the best of my knowledge, the only distributors we have employed in this district have been direct employees of the Kellogg Company; that is, for the Whole Wheat Biscuit. I am sure we have not had any contract distribution of Whole Wheat Biscuit. We have used it for sampling some of our other products. We are carrying on sampling of other products than Whole Wheat Biscuit at the present time.

I do not know how many restaurants there are in the San Francisco territory. I would not dispute you if you said that in round numbers there were about two thousand in San Francisco and its environs, including the Bay section, over in Oakland and Alameda. I presume there may be that many. I think that is a little bit high. The estimate would not shock me particularly as being exaggerated.

I do not mean that all the two thousand restaurants would serve cereals in individual packages, nor have I personally seen all or the greater part of them. I base my opinion on the daily salesmen's reports. It is an opinion. We instruct our salesmen to push the sale of the small package to restaurants and places where the product is served to a consumer. We nat-

urally do not forbid them to sell the larger package if they cannot induce the restaurant man to take the small packages. It would depend somewhat on the type of outlet. Theoretically, we would not insist upon the use of the small package to the extent of passing up sales to a reasonably reputable restaurant. In actual practice, we find that, if a man can be sold our biscuit at all, he can be sold in individual packages. We are not in the habit of making combination offers to the retailer. We have encouraged the grocer to make the combination sale of three packages.

For instance, our salesman will go into a store and arrange for the dealer to hold a special sale on Saturday, three packages of our products in a combination sale. That might be any three products, although we try to make three different products, such as corn flakes, rice krispies, and whole wheat biscuit; or it might be Pep, Brand Flakes, All-Bran, and Krumbles. We may offer a small premium to the consumer, in the way of a novelty for children or something useful, as an inducement to buy those three packages. We have offered a combination in which we said we would sell two packages for a quarter and give free a package of whole wheat biscuit. That has been done. That is useful in introducing either a new or a comparatively new product, new to the territory or a product which moves a little more slowly than the other. It has been adopted in the introduction of Whole Wheat Biscuit.

The Kellogg Company furnishes cuts to customers, to aid them in advertising. The customer, as a rule, gets up his own copy; although our salesmen may occasionally assist the dealer in getting up copy. The biscuit is usually advertised as Kellogg's Whole Wheat Biscuit. It is true that, sometimes, a dealer will put out a handbill or a half-quarter page in the paper and call it Kellogg's Shredded Wheat. That does happen. We encourage them to advertise our

product; but we prefer and have requested our sales men, on numerous occasions, in sales conferences and through bulletins, to get the dealer to feature our product as Whole Wheat Biscuit, not as Kellogg's Shredded Wheat Biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I am quite sure our product has not been sold as shredded wheat, apart from the name Kellogg's, although I can only speak for my own territory. It has never been sold other than under the Kellogg name and in the Kellogg package, in this territory. On all our packages, the name Kellogg's is displayed, very prominently. I purchased this package of "shredded codfish, Defendant's Exhibit 12, from a local grocery store.

Defendant's Exhibit 13, a package of Baker's Cocoanut, marked "Premium Shredded," was purchased from a local grocery store.

Defendant's Exhibit 14, Kellogg's Whole Wheat Flakes, is a sample package, currently used as samples.

(A package of Muffetts was offered in evidence and marked "Defendant's Exhibit 15.")

HOBART W. MEARS.

Deposition taken at San Francisco, California,
February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am Hobart W. Mears, residing in Ross, California, aged forty-four. I am purchasing agent of the Mateson Navigation Company and have been for sixteen years. I purchase food supplies for that concern.

I am familiar with the product known as Kellogg's Whole Wheat Biscuit. I first became acquainted

with it through salesmen who called on me. My office is at 480 Main Street, San Francisco. I purchased the product through these salesmen, and I have since continued to handle it. I do not remember how long I have handled Whole Wheat Biscuit. We were approached two or three years ago, I believe. We use it in the individual cartons and it is served in those cartons to our consumers, travelers on the Matson ships.

CROSS-EXAMINATION.

THE WITNESS: I have heard of Shredded Wheat. We have not bought any, to my knowledge, during the time we have been using the Kellogg product, for two or three years past. I will not say that we have no Shredded Wheat on the ships, because they go to other ports and they may have gotten it there. Stewards on ships in a foreign port have liberty to purchase locally anything they need. If the ships run short of supplies, they are at liberty to purchase what they need. The large bulk of standard supplies, however, such as dry cereals and other items that keep, are purchased through me, largely in San Francisco, which is the headquarters of the Line. A steward making quantity purchases in another port is the regular thing, not the exception, because they are forced to buy at other ports. We cannot figure positively how much a ship is going to need. She may run out of a certain item between here and Honolulu. The Lurline came here from New York on her maiden voyage last month. As far as cereals are concerned, I do not know what she had. She took on her supplies at New York. She may have had Shredded Wheat of the National Biscuit Company at New York. I have purchased that Shredded Wheat in the past, probably prior to the three years or so we have been using Kellogg's. I

have known of Shredded Wheat myself since I can remember anything. It has always been called Shredded Wheat and has always been made in this pillow-shaped biscuit with shreds or threads of wheat. So far as I know, it has always looked the same since I ate it as a boy at home.

I have sailed occasionally on some of our own ships. They have menus in the dining saloons. There is a list of cereals on the breakfast menus. I believe the Kellogg Biscuit is listed both as Whole Wheat Biscuit and Shredded Wheat. We try not to advertise on the menus. We would not list a brand of coffee under the brand name. If we had Shredded Wheat on board, we would list it as Shredded Wheat, and we might list the Kellogg biscuit either as Whole Wheat Biscuit or Shredded Wheat, or both, although it is not called Shredded Wheat.

I recognize Plaintiff's Exhibit 162 as a menu of the Lurline. Shredded Wheat is listed among the cereals. I do not know whether we had Shredded Wheat on board on January 19, 1933. She was on her way from New York when that menu was printed. She was not victualed in San Francisco until after she arrived, which was the twenty-fifth of January. That menu was used on her maiden voyage from New York.

We have a steamship Monterey, plying between here and Australia. She was on the high seas on the date of the menu, December 27, 1932, probably outward bound to Australia. I recognize Plaintiff's Exhibit 163 as a menu of the Monterey. Under cereals is the term Shredded Wheat. She had no Shredded Wheat on board, to my knowledge, when she left San Francisco on that voyage.

We purchase only individual cartons of Kellogg's Whole Wheat Biscuit. The waiter brings them to the table in the individual package. That is the customary way of serving them.

RE-DIRECT EXAMINATION.

THE WITNESS: My understanding of shredded whole wheat biscuit is that it is a breakfast food, served as a dry cereal, made of wheat. I do not know the technical way the wheat is treated; but I understand it is shredded. It is put through some sort of process whereby the wheat can be shredded, so-called. The shreds are then put into the form of a biscuit.

The Kellogg biscuit is made of wheat, I understand, shredded and formed into a biscuit. We are buying Kellogg's Shredded Whole Wheat Biscuit and are serving them to the public. As far as I know, we have never had objection from the traveling public that we were not serving what they asked for. They get the package and know what they are getting. There are probably lots of objections from passengers on ships. They have nothing else to do but kick about the food. If objections come in any quantity from various passengers, the matter is brought to the attention of the port steward and then to me. There has never been any objection to our serving Kellogg's Whole Wheat Biscuit.

RE-CROSS-EXAMINATION.

THE WITNESS: I know that the Shredded Wheat I have known since I was a youngster has always been known as Shredded Wheat. It has always, in the minds of the public, been associated with the Niagara Falls or Oakland manufacture. I am familiar with the box with the picture of Niagara Falls on the end, and a picture of the factory. I have known that all my life. If Shredded Wheat is mentioned, that famous Shredded Wheat Biscuit is called up in my mind. There is no question about it. Even though I have not heard a multitude of objections from passengers sufficient to bring it to the home office, it does not follow

that some people may not have thought they were getting a different kind of Shredded Wheat or something substituted for it when they got the Kellogg product on our ships. It is quite possible there have been complaints. The Kellogg biscuit looks considerably like the Shredded Wheat Biscuit. I think an order for shredded wheat could be filled with the Kellogg biscuit. No doubt it has been. Apparently, many persons may accept it and not raise any question about it.

Re-DIRECT EXAMINATION.

THE WITNESS: I do not know any other descriptive name for this product than shredded wheat biscuit. It is a wheat biscuit. I do not know what else you can call it. You cannot very well call it a cracker. I would hardly call it a flaked biscuit. A flake is something flat and rolled out.

Surely, for at least two or three years, I have been cognizant of the fact that this product I have described as a shredded whole wheat biscuit is being made by two different manufacturers. We bought Kellogg's biscuit because they were offered to us cheaper than we could buy Shredded Wheat, without sacrificing any quality in the product we were buying and without changing the physical character of the product that was served to our customers.

RE-CROSS-EXAMINATION.

THE WITNESS: We assumed the two products were substantially identical for the purposes of our service, and we got a little better deal from Kellogg than we could from the National. That is the whole story.

JOSEPH G. COHEN.

Deposition taken at San Francisco, California,
February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am Joseph G. Cohen, 185 Vasquez Avenue, San Francisco, age forty-two; a buyer for Haas Brothers, wholesale grocers, located in San Francisco. I have been a buyer for them since September 15, 1928. During that time I have been acquainted with products of the Kellogg Company at Battle Creek, Michigan. My concern handles those products, Corn Flakes, Pep, and Kellogg's Whole Wheat Biscuit. The latter product has been known by that name during the time I have been acquainted with it. We also handle the Shredded Wheat Biscuit. Naturally I do not know how it is manufactured, but, in appearance it is similar to the Whole Wheat Biscuit. The National Shredded Wheat Biscuit are packed thirty-six to the carton, and Kellogg's Whole Wheat Biscuit are packed twenty-four to the carton. When I say carton, I mean cases, not individual cartons. We handle it in a wholesale way, and I am not familiar with the number of biscuit in a retail package.

We have handled Niagara Falls Shredded Wheat for some years. We do not still handle it in the same volume or quantity we formerly did, because the National Biscuit Company sells direct to the retail trade. The Kellogg Company does not, to my knowledge, distribute direct to retailers, but exclusively through jobbers and wholesalers.

The orders for these two products reach us through our salesmen and also by telephone. The Kellogg product is ordered as Kellogg's Whole Wheat Biscuit. If my house were to receive an order for Kellogg's Shredded Wheat, they would understand they were to ship out Kellogg's Whole Wheat Biscuit.

I cannot say definitely if we receive orders in that way; but, to my knowledge, we do not receive them generally in that manner. They usually come in calling for Kellogg's Whole Wheat Biscuit. They are listed in our price book as Kellogg's Whole Wheat Biscuit. The salesmen have instructions to write up orders as they are listed. So, in practically all cases, an order sent in by salesmen would be for Kellogg's Whole Wheat Biscuit. As far as I know, there is no confusion between these two products in our concern, at all.

CROSS-EXAMINATION.

THE WITNESS: We still carry Shredded Wheat Biscuit. If a retail customer were to call up and ask for Shredded Wheat, he would get Shredded Wheat Biscuit, manufactured by the National Biscuit Company. I have been in the food game since 1906, so I have known Shredded Wheat for a good many years. It was Shredded Wheat in 1906. I cannot say about before that. My recollection does not go back that far. From my time in business, it has been known as Shredded Wheat. I cannot say definitely, how long I have known Kellogg's Whole Wheat Biscuit by that name; possibly, the last three years. Before that, they sold the same article as Kellogg's Shredded Whole Wheat Biscuit. We carried that, also. When we carried the item under that former name, I cannot remember how the orders were received. I only handle about three thousand different items. It is pretty hard to remember a detail like that. I cannot recall it. I would say that, even when Kellogg's was known as Kellogg's Shredded Whole Wheat, if an order came in for Shredded Wheat, the National Biscuit Company's product would be sent out on the order. That has been so before and after the Kellogg people got into this line with the biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I would understand substitution, as applied to the wholesalers' business being the substituting of another brand or variety of merchandise for a particular article, when there was no question of doubt what article was intended to be ordered by the buyer. My house does not practice substitution of that kind. The practice is general among wholesalers not to substitute.

I do not know whether the Kellogg biscuit is the same type of biscuit physically now as it was when it was known as Kellogg's Shredded Whole Wheat Biscuit. I do not believe I have seen a package of the Kellogg biscuit for quite some time. We have so many items that we do not go into it. I am just familiar with the wholesale case containing twenty-four cartons and with the package contained within the case, but not with the biscuit itself.

We have handled the Kellogg biscuit in the individual carton. Whether we have them in stock or not, I could not say. Our house deals with both the grocery trade and hotels and restaurants. We do handle the individual, two-biscuit carton. It is not sold at all to the grocery trade; to the restaurant trade, only. The small cartons is the general form in which the restaurant and hotel trade usually buys whole wheat biscuit.

I believe I have been familiar with the Kellogg biscuit ever since it has been put on the market. I do not recall when that was. I would say they come directly into competition with the shredded whole wheat biscuit made by the National Biscuit Company. It is, competitively speaking, a similar product, the same, I would say, as Kellogg's Corn Flakes and any other nationally advertised brand of corn flakes. The Kellogg and the National biscuit are physically the same

product in general appearance. I do not know whether they are in the same size or not.

RE-CROSS-EXAMINATION.

THE WITNESS: The Kellogg biscuit will supply the same call as Shredded Wheat. That is what I mean by competitive. Where, for many years, Shredded Wheat has held the field as the only item of that kind, we now have Kellogg's Whole Wheat Biscuit, which could be used to fill the same want to the consumer.

Haas Brothers are interested in a voluntary chain, the I. G. A., Independent Grocers Alliance, a very large organization, covering a great portion of the United States. Approximately two hundred and twenty units of the I. G. A., in California constitute the portion we are interested in. Under our arrangements, it is possible for manufacturers to contact retail stores directly. The National Biscuit salesmen can contact retail stores and take orders for their product. Haas Brothers pay the bills, and have a discount for their trouble. Shredded Wheat is sold through our I. G. A. outlets in that way.

I have no doubt that Haas Brothers are very particular that a customer gets what he orders. If a customer asks for Shredded Wheat, he gets the National product; if he asks for Kellogg's Whole Wheat Biscuit or Kellogg's shredded wheat, we know what he means. There is no confusion or substitution in our dealing with our retailers. I know nothing about the contact or relationship between the retailer and the consuming public.

JOSEPH B. BRUN.

Deposition taken at San Francisco, California,
February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-three years old, a buyer for Western States Grocery Company, with whom I have been connected since they began, March, 1928. Before that, I was connected with J. H. Newbaner, now out of existence, liquidated.

I know of a product called Kellogg's Whole Wheat Biscuit. As far as I can describe it, it is something like the Shredded Wheat Biscuit you buy from Oakland; but I believe it is a smaller biscuit. Except as to size, it is practically the same kind as the Oakland biscuit, practically identical. By the Oakland biscuit, I mean the National Biscuit product. We have known it as the Oakland biscuit, because it was always from there. The National has taken it over. It is practically known the same way, as far as we are concerned.

I believe we have handled the Kellogg biscuit ever since they were on the market, some two and a half or three years, if I am not mistaken. When they first came out, they were known as Kellogg's Shredded Wheat, I believe, and they changed over. In the beginning the grocery trade used to order those biscuit as shredded wheat. We had some cafeteria trade that came through, and they would want Kellogg's. There were times they would come in for *shredded wheat* and we would know they wanted Kellogg's. We would ask them which they wanted, because, if we sent out the Oakland Shredded Wheat, as we termed it then, a lot of it would come back, because they wanted the Kellogg shredded wheat.

Orders do not come to us now for Kellogg's shredded wheat; they have changed over and orders

come to us for Kellogg's Whole Wheat Biscuit. Our Oakland Shredded Wheat has dropped off materially. I believe we sell hardly any. I have not bought any for months. They have sold direct to the trade. They go right to the wagon trade. They are practically out of the picture, as far as that is concerned. I believe we have not sold ten cases in a month. There is no confusion in our house as to the sale of the Oakland and the Kellogg products. The grocers specify clearly which they want, and we give it to them. We do not substitute anything at all. By *substitution*, I mean to give something I think will be exactly the identical type of merchandise to what the party asked for, which you did not have, which was not the product they specified they wanted. Our house does not practice substitution, unless it is authorized by the customers. If a customer orders one kind of a product and we do not have it, we offer him something else. If it is o. k., we send it to him; if not, we do not send it. That is what might be called authorized substitution.

I cannot say whether substitution is practiced generally in the wholesale trade. I am not familiar with what the other people do on that. I am practically in the buying end of it. So far as our cash-and-carry and carry departments are concerned, we substitute nothing at all. We speak to them. If they want to use something else, all right; but we would not substitute without their knowledge of it.

The retail division of our concern conducts retail stores as well as wholesale; the Safeway, MacMarr, and Piggly-Wiggly. The retail division is what I mean when I speak to a customer about trying a new product. Of course, I do not want to go on record as stating anything regarding the retail division. I do not know what they do. We have in our organization six wholesale depots, aside from our main office. No substitution is practiced in those depots. I do not know, of my

own knowledge, what the general conditions are among other wholesalers, as to whether they substitute or not.

We do not practice substitution for the simple reason that, nine times out of ten, it comes back to you. The grocer will not accept it if it is not what is ordered. It comes back and it is only additional expense to put credits through. The bulk of our business in shredded whole wheat biscuit is in the Kellogg product.

For the period of time the National Biscuit have been selling Oakland Shredded Wheat, they have been selling it direct. I have no record of that, except a very limited sale now. I believe there is a genuine demand for Kellogg's Whole Wheat Biscuit among the customers of our house. They seem to be buying it all the time, so there must be demand for it.

CROSS-EXAMINATION.

THE WITNESS: I am in the buying end of the business; but, when the order desk will be busy, big accounts, such as cafeterias, come over to my 'phone. I buy supplies in wholesale lots from the manufacturer, generally; so my contact with Kellogg's Whole Wheat Biscuit is as a buyer, to fulfill the requirements of the various branches. Western States Grocery Company is a wholesale grocery. Our cash-and-carry stores belong to us. They are a direct branch of our firm. We have them in outlying districts, such as Army Street, Fulton Street, Sacramento Street, First Avenue. They are wholesale units for the convenience of the retailers; six wholesale branches. You might call it a sort of wholesale chain store. We carry our supplies in these various six units; and the retailer may come there, make his purchases, and take them away. We supply the Safeway Stores with their requirements. We are affiliated with them, part of their organization. They are an organization of retail chain stores. Safeway, MacMarr, and Piggly-Wiggly have about two hun-

dred stores here in town. All we are interested in is just San Francisco, except that we have a few stores in Redwood City which we acquired. They have come over into our field. We have taken them away from Oakland. The Western States fills the position of jobber for this chain. We purchase shredded wheat and other cereals that are purchased in bulk and distribute them to those retail stores as they order them out. We sell to any legitimate retailer. The bulk of our business is to the chain stores. I believe they are all cash-and-carry stores. I believe practically all of them are self-service stores. Piggly-Wiggly is self-service. Shredded Wheat, as made by the National Biscuit Company, is carried in the Safeway and Piggly-Wiggly Stores. The National Biscuit distributes Shredded Wheat and its other products from its bakeries direct to the various units. That is why we are more or less out of the picture regarding National Biscuit Shredded Wheat. The Safeway Stores are sold by the National Biscuit Company as a chain. The Western States Grocery Company do not participate in any of the wholesale discounts given by the National Biscuit Company when they are sold direct to Safeway Stores. The Safeway organization deals with the Biscuit Company. We buy independently of them. Anything we do, as far as I know, is handled with our own firm.

I have been familiar with Shredded Wheat for a long time. At one time there was a question in my mind as to what a customer meant when he placed an order for Shredded Wheat, when Kellogg called theirs Shredded Wheat. Prior to that time, there was no other shredded wheat, before Kellogg's came out. There was only one. I do not believe there was any item that could be substituted for it, to my knowledge. At present, assuming the dealer was willing to make a substitution, there is Kellogg's Whole Wheat Biscuit which could be used to fill an order for Shredded

Wheat, providing it met with the approval of the customer. We would not knowingly substitute anything at all.

If a customer called on the telephone now and asked for a case of shredded wheat, we would ask him what he wanted; because some customers still know Kellogg's biscuit as shredded wheat. We know some customers use Kellogg's shredded wheat right along. For instance, one account, Foster's lunch, I know particularly, when they called for shredded wheat, got Kellogg's, because that is what they always used and we knew it. Other customers whose wants we would not know would get the regular Shredded Wheat, if they did not specify Kellogg's. There are very few calling for the National Biscuit Shredded Wheat now, since they have gone direct with them. They get their supply of Shredded Wheat direct from the manufacturer.

If we do participate in anything with the Safeway organization, it is of a confidential nature I know nothing about. There is a financial connection; but regarding any buying power or anything like that, I do not know about our participating in it.

RE-DIRECT EXAMINATION.

THE WITNESS: We handle the Kellogg individual-size Whole Wheat Biscuit, selling to restaurants, cafeterias, and hotels. The sale of the individual is far ahead of the regular package, because practically all shredded wheat goes right to the restaurants. They ask for Kellogg's individual shredded wheat, and that is what they get all the time, all ready for service.

I do not think it would be up to the wholesaler at all, to introduce new products to the retail grocery trade. Of late years, their own direct factory representative comes out. They contact the retail trade and create a demand for it. He will come around to us, stating they have two men working on the trade, and

they ask us to put some in on a guaranteed basis. That is the only way. The wholesalers work to supply a demand that has already been created. Judging by the orders for Kellogg's, I would say there is a demand for that product in the trade.

MRS. HAROLD L. MACMILLAN.

Deposition taken at San Francisco, California,
February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife and have a little girl, seven. We live in San Francisco, since June; before that, in Seattle, two years. I have heard of a product called Kellogg's Whole Wheat Biscuit. I think I first saw it on the shelves in the Piggly-Wiggly store. I purchased it, because I have used Kellogg's products consistently for some time. It was in with the other Kellogg products on the shelf in the shop. When I first saw the package, I imagined it was something similar to Shredded Wheat Biscuit; but that was as far as I know. I decided I would take one and see how we liked it. We tried it. I thought it was quite similar to Shredded Wheat, although we liked it better. We liked the size better. One of the others seemed too much. This size in the Kellogg box I thought was a better size; because my child would not eat a whole one of the other, but she would eat a whole Kellogg Biscuit. We got more biscuit in the box, so I did not really waste any at all. She used one biscuit a morning. I have continued to use Kellogg's Whole Wheat Biscuit. I believe it is called just Kellogg's Whole Wheat Biscuit. I pick my own things off the shelf. I am a cash-and-carry shopper. I go into the shop. There are baskets provided for the customer as you go in. You pick up your basket and go around. I usually have a list. If

it is a shop I usually shop in, I know just about where everything is. Kellogg's products are practically all on the shelves of the same section. They have Pep and the different things. I take my biscuits and get butter, bread, and so forth on the shelves; go back to the checker at the counter; he checks my articles, tells me how much it is, and I pay for them and take them home. I get practically all my groceries that way, taking them off the shelves.

I have noticed on the shelves of the stores I deal with another shredded wheat biscuit besides Kellogg's, which I think is just called Shredded Wheat. I believe it is the same type of product as the Kellogg biscuit, except as to size, although we just felt we liked the other better. I think the size had a great deal to do with it. It is a similar biscuit. I have purchased it ever since I found it on the shelves.

I dealt with old-line service stores in Seattle when I first went there, Benzak-Benson's, because I was not near a store, and I could not carry things any distance. I only shopped that way for a couple of months. It was too expensive. I had not been in Seattle long enough to know what they had on the shelves. I ordered practically everything by name. The introduction to me of Kellogg's biscuit was by seeing it on the shelves and by taking it at that time and trying it.

CROSS-EXAMINATION.

THE WITNESS: Before I discovered Kellogg's Whole Wheat Biscuit, we used Shredded Wheat occasionally. I used to buy a box. My small daughter did not care for it greatly. I do not buy Whole Wheat Biscuit now every time I go to the store. I buy Pep and so on, rotate all her cereals. It may be fair to say that I am a Kellogg customer and like Kellogg products. I can tell you the same thing about Post Toasties. I used to think I liked Post Toasties as well as Kellogg's Corn

Flakes, until I used enough Kellogg's to realize there was something about the product I liked better. When Kellogg came out with a biscuit that looked like Shredded Wheat, I felt it would be something reliable and made by a concern I believe in, so I tried it. I found I liked it better for my purposes, because of its size. Before my little girl was born, I very seldom used Shredded Wheat. I do not eat cereal at all. I knew about Shredded Wheat. I do not think many girls, before marriage, pay much attention to those things. If you do not like them, you do not eat them, and you do not pay much attention to them. Even as a young girl, I did know Shredded Wheat, knew what it was.

I was asked by Mr. West, a friend of mine, but no relative, to come and give a deposition. I am not related to anyone connected with the Kellogg family. I am a Canadian.

RE-DIRECT EXAMINATION.

THE WITNESS: Mr. West is not a neighbor. I lived in Burlingame. That is where I first met Mr. and Mrs. West. I lived in Toronto six or seven years ago and I used Kellogg's products long before I came to the United States. My first experience with Kellogg's Whole Wheat Biscuit took place in Seattle, where I lived for two years previous to June.

L. P. SCHMIDT.

Deposition taken at San Francisco, California,
February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-seven years old; vice-president and general manager of the Purity Stores, Front and Union, which are a chain organization of retail stores, some service and some self-service. They

are all cash stores. I have been connected with the grocery business about twenty years. I have knowledge of the product known as Kellogg's Whole Wheat Biscuit. We have handled them in our stores about a year and a half. I had seen it before. I did not know it when it was called by another name. I have only known it as Whole Wheat Biscuit. They have been carried in our stores about fifteen months, and there is a consumer demand for it there.

We handle the Oakland or National brand of Shredded Wheat and have handled it for many years. We buy it direct from the National Biscuit Company. We buy the Kellogg biscuit direct from Kellogg. The customers ask for them as Kellogg's Whole Wheat Biscuits. If any of our customers asked for Kellogg's Shredded Wheat, I would give them Kellogg's Whole Wheat Biscuit. I would describe it as made out of wheat, shredded, in the shape of a small pillow. I would say it resembles, physically, in appearance, the National Shredded Wheat biscuit. It is smaller in size. There are more in a package, and more by weight, I believe.

I believe, at the time we took the Kellogg biscuit on, they had a cellophane window in the package and attention was drawn to the fact that there were more biscuits in the package. I believe there is half an ounce more weight in the package. In our advertising, we probably featured them as being so many in a package and the weight. Naturally, the salesmen or clerks would do the same thing. That type of advertising would, I think, have the effect of creating consumer demand for Kellogg's biscuit.

I believe there is a genuine consumer demand for Kellogg's biscuit existing in our stores. Substitution is something we never practice. A woman steps in and asks for a certain brand. It would be substitution if the clerk immediately offered her something just as

good, or another product. We do not encourage our men to do that.

We distinguish between the clerk offering something just as good and handing out a different product without remark; but, in our store, the clerks do not even try to interest them in something just as good, particularly in a cereal. The time required to talk about another cereal is not justified. I do not believe any good grocer will substitute. After all, we are here to serve the public and give them what they want. I do not believe any real or substantial business would be built up in the trade on the practice of substitution.

We advertise to consumers by means of circulars and in newspapers. We have advertised Kellogg's biscuit since we first stocked it.

CROSS-EXAMINATION.

THE WITNESS: We have one hundred and ten stores in our chain, all in northern California. We have consumer demand for Shredded Wheat, also. We sell it in fairly large quantities. We buy it from the National Biscuit Company. We do not handle other National Biscuit products, their crackers, or their baked goods. I have been familiar with Shredded Wheat for a great many years, nearly as long as I can remember. It has always been known as Shredded Wheat and always looked the same as it looked today, a small-sized pillow-shaped biscuit. When I started to describe the Kellogg biscuit, in answer to Mr. Clarke's question, I started to say it was a shredded wheat biscuit. That was the first thing that came into my mind. If my customers ask for shredded wheat, I give them Shredded Wheat, the product sold by the National Biscuit Company. I would not offer such a customer Kellogg's Whole Wheat Biscuit. I would consider that substitution. My stores and the better class of grocery trade do not try to substitute

one article for another. I presume there are all kinds of people in the grocery business and some would substitute if they did not happen to have Shredded Wheat. If a call came for Shredded Wheat and the grocer had only the Kellogg biscuit, he probably would substitute it for that particular call. I think the Kellogg biscuit is the same kind of food and would, to a certain extent answer the call. It is similarly made and looks like Shredded Wheat Biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not think it would be possible to get a customer to take the Kellogg's product and think she was getting the Niagara Falls product. Supposing, for instance, an order for a can of coffee. The clerk might say he did not have XYZ coffee but had ABC coffee, or coffee just as good. He would certainly not lose the sale if he could possibly avoid doing so. My clerk would say, in this instance: "We do not have the Shredded Wheat or the Niagara Falls Shredded Wheat, but we have Kellogg's." I think that is what I meant to tell Mr. Vilas when I said the Kellogg product could be substituted if somebody asked for Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: I have had actual experience in selling at retail in stores. A discerning customer handed a package of Kellogg's Whole Wheat Biscuit would have no doubt it was made by Kellogg; but, no doubt, we have customers who do not notice so closely. We have customers who, perhaps, trust the grocer, give orders, and assume they are getting what they ask for. Some people send their children to get groceries. While I do not believe any of our managers would do it, it would be possible for a child to ask for Shredded Wheat

and carry home a package of the Kellogg biscuit, thinking she had what she asked for.

RE-DIRECT EXAMINATION.

THE WITNESS: When a child brings back something else than it has been told to ask for, I think you make enemies. Some of the consumers would return the product.

RE-CROSS-EXAMINATION.

THE WITNESS: Some of them would not. We find some inertia in consumers. When they get something that can be used, they say, "Oh, well, I will take it"; and we never hear of it again.

RE-DIRECT EXAMINATION.

THE WITNESS: When they do not complain, we do not know if they have any complaint, unless you lose sales in that particular store. These are all just small things that count in making a store a success.

In our stores, for these reasons, we do not practice substitution. We consider 80 per cent. of the sales ability of a store will lie with the men in the store, not so much the price or the article. When one of our clerks explains to a customer we have a new kind of a certain product and would like them to try it, I regard that as absolutely legitimate.

MRS. A. E. KRUG.

Deposition taken at San Francisco, California,
February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I do not necessarily know anyone connected with either the National Biscuit Company or the Kellogg Company. I do not know Mr. West. I have heard of the product known as Kellogg's Whole Wheat Biscuit. I use it, and have used it, I believe, for several years. They gave samples around at the doors, a small carton containing two biscuit, marked Kellogg's Whole Wheat Biscuit, and the man said it would be at the stores. I gave it to the youngest one for breakfast one morning, and she liked it. Seeing she liked it so well, I got more at the store, and continued to buy the Whole Wheat Biscuit.

Sometimes I buy it at a chain store, but mostly at independent service stores. I tell the clerk I want a package of Kellogg's Whole Wheat Biscuit. I do not believe I have bought it in self-service stores, and do not know whether I have seen it there. I continue to buy it from time to time. We experiment with foods, on account of the youngsters. I have three. When anything new comes, we always try it. If we like it, I get more. That was the case with Kellogg's biscuit. Previous to that, I had used Shredded Wheat and tried Muffetts and several different biscuit like that. They liked Kellogg's the best. I could not say whether Muffetts are shredded. They are round, cake-like things.

CROSS-EXAMINATION.

THE WITNESS: I do not buy Shredded Wheat now, because my little one likes Kellogg's biscuit better. Before we got the Kellogg sample we bought Shredded Wheat, not a long time. I did not think a whole lot

of Kellogg's; we bought it because the little one liked it. I have known about Shredded Wheat. Everybody knows Shredded Wheat, yes, indeed. I never heard the Kellogg Whole Wheat Biscuit called shredded wheat. I did not know about Kellogg's biscuit before it was brought to my door within the last couple of years.

RE-DIRECT EXAMINATION.

THE WITNESS: By shredded wheat or shredded whole wheat biscuit I mean wheat that is shredded. That is about the only way I can describe it.

RE-CROSS-EXAMINATION.

THE WITNESS: I am with Mrs. Maude. Mr. Jensen, who, I guess, is with the Kellogg people, asked us to come. He is a neighbor. They asked us to come and tell about the purchase of the Kellogg product.

RE-DIRECT EXAMINATION.

THE WITNESS: I guess I have seen advertisements of Kellogg's Whole Wheat Biscuit. I do not remember.

MRS. JENNIE MAUDE.

Deposition taken at San Francisco, California,
February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife. Mr. Jensen, of the Kellogg Company, asked me to testify in this case. I have heard of and used the product called Kellogg's Whole Wheat Biscuit. I should judge I first heard of it about three years ago, through a sample that was delivered at my door. We put it on the table, used it, liked it, and we have bought Kellogg's ever since.

Previous to that sample, we had used the Niagara Falls or Oakland Shredded Wheat. I prefer Kellogg's because it is not such a large biscuit and I like it in general. I have always bought Kellogg's since that sample came. Sometimes I get it at chain stores and sometimes at neighborhood stores. The chain stores are help-yourself, the other is service. In the help-yourself store, you go around until you find the package marked Kellogg's Shredded Wheat, pick that up, take it to the checking clerk, and pay him for it. The clerk does up your packages after you have picked them off the shelf. I have seen the Kellogg biscuit in that type of store, as well as the Niagara Falls biscuit. They are usually in the same corner or on the same shelf or in the same locality.

CROSS-EXAMINATION.

THE WITNESS: I used Shredded Wheat before I knew about Kellogg's biscuit. I have known about Shredded Wheat for a long time. When I got the sample from Kellogg, I thought Kellogg was starting to make shredded wheat. It looked like the other biscuit, except in size. I like the way it is cooked a little different. It is ground up a little different than the other one. It varies just a little bit from the Shredded Wheat I had known before, so after that I went to the store and looked for the Kellogg package.

RE-DIRECT EXAMINATION.

THE WITNESS: Very few grocers or grocery clerks ever ask me to try new products. I usually get started on a new product nowadays by the sample.

MRS. INA HOLMES:

Deposition taken at San Francisco, California,
February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I know Mr. West and Mr. Stanton, neighbors of ours, connected with the Kellogg Company. I have known Mr. West about a year or two. I have known the Kellogg Company for years. I always use the Kellogg products if I can. I have four children.

I have used Kellogg's Whole Wheat Biscuit, I should judge, two or three years. When I use shredded wheat biscuit, I use Kellogg's. My first reason would be because it is made by the Kellogg people. My next reason is that I think it is a whole wheat biscuit. I thought Shredded Wheat was a white biscuit, just like the difference between white and whole wheat flour in our home. I thought the larger whole wheat biscuit, which comes in a box like Plaintiff's Exhibits 10 and 1, is white. That is not supposed to be a whole wheat biscuit, is it? Is there not a difference of color in the biscuit? I think the Kellogg biscuit is darker, and that is why I thought it was a whole wheat biscuit. Plaintiff's Exhibit 1 is a lighter biscuit. I would not say it is not whole wheat. That is just my own personal opinion. I am not a dietitian. The Kellogg biscuit is also smaller.

As I have used Kellogg's whole wheat product always when I get them, because I heartily approve of the Kellogg people, after I found theirs was a shredded whole wheat biscuit, I used that biscuit. I ask for their products. I did have the thought it was made of whole wheat, while I did not know the other was. I never knew of whole wheat being on the box before.

CROSS-EXAMINATION.

THE WITNESS: Before I knew about the Kellogg biscuit, I have used the other Shredded Wheat, like Plaintiff's Exhibit 1. I have known of it and used it for a long time back. I did not have the impression it was not a whole wheat biscuit until after I had used the other. Then I thought that was a whole wheat biscuit. I was surprised when I saw whole wheat on Plaintiff's Exhibit 1 a few minutes ago. I never read the label or printed matter on the label. Perhaps that is why I did not know. I saw this label a minute ago. I see it says "Made of the whole wheat, nothing taken away." I was a bit surprised when I saw that on there. The Kellogg biscuit is darker, though.

My method of purchasing Shredded Wheat was just the same as the way I purchase Kellogg's. I went to the store and asked for Shredded Wheat; particularly after I found the Kellogg people had it, because I would prefer Kellogg's products. I am friendly to the Kellogg Company. I believe in their products. They make good things. I think one of my reasons for wanting to try that biscuit was that I found they were making it. It was a good biscuit, too. If it were a poor biscuit, I would not use it, merely because it was a Kellogg biscuit.

I am a friend of Mr. West. We are neighbors. There is also a Kellogg salesman my husband plays golf with, Mr. Stanton. I do not know him very well. Mr. West asked me to come down and tell what I knew about the biscuit, because he knew I use these products.

RE-DIRECT EXAMINATION.

THE WITNESS: I deal in self-service stores, with most any store where I can get the best, the most for the money, now. I go to the counter and help myself, have the goods checked and pay for them at the door.

Not only that way, but I trade with other stores where I do not help myself. I never had any trouble buying Kellogg's Whole Wheat Biscuit. They carry them in stock. Sometimes they are out of them, but they may be out of almost anything at times. I cannot remember ever having any trouble getting it.

CHARLES VON HUSEN.

Deposition taken at San Francisco, California,
February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer and have been in that business since 1909. I have my own service store, in a medium-grade residential district. We have about a complete line of Kellogg's products in our store. We handle Kellogg's Whole Wheat Biscuit. It is shredded wheat, made by Kellogg and put up in Kellogg packages, similar in color to other Kellogg packages. I took on Kellogg's Whole Wheat Biscuit as soon as they were introduced to me by the salesman, Mr. Jensen, who came to me and showed me the biscuit. He explained it. I believe he opened the package and showed me where it was a shredded wheat biscuit. He showed me the public were getting three more biscuit for the price of the other package. I bought it at that time, because we like to have new items when they come in. We like to be first in the neighborhood to have them, if possible. A customer will often think a product similar to another one put out by another manufacturer is better. The public like to buy new products and to experiment around, especially, I believe, in the cereal line.

The Kellogg Company does not have a return-products policy, that I know of. It seems to me that

Mr. Jensen did pick up some Krumbies that did not move so fast and exchanged them for other merchandise. It is more or less of a guaranteed sale, the way I understand it. If an item does not move readily, rather than see it go bad on your shelf, they will salvage it.

I do not believe the Kellogg Company have ever helped the retailer sell the goods, aside from promotion of combination sales of two or three items. The name Kellogg on the Whole Wheat Biscuit package would help to connect it up with the other products. I believe the Kellogg name has a lot behind it, as regards the consumer as well as the retailer.

I think we asked people if they would like to try the Kellogg's Whole Wheat Biscuit, explained they were getting a little more for their money than in the other package, probably a little more tasty. That is an effective method we often use of introducing product to our trade. It is effective in introducing it to customers. People are always looking for a little more for their money if they can get it. We have several people who demand Kellogg's shredded wheat biscuits; had one in the store yesterday. We have continued to carry Kellogg's wheat biscuits continually.

We handle the original Shredded Wheat, the other shredded wheat, of Niagara Falls. We still carry that in our store. I cannot say we find any confusion among our customers as to the two products.

Our customers usually specify Kellogg's when they want the Kellogg product. When they ask for the other product, they just say Shredded Wheat. When he does, we usually ask which one they want, original Shredded Wheat or Kellogg's shredded wheat. That is our usual method, except at times when we have advertised the other Shredded Wheat on an ad for nine cents. Then it is understood that is the one they are going to get, the original. At other times, however, I ask

which shredded wheat they want, the original or Kellogg's.

CROSS-EXAMINATION.

THE WITNESS: For a good many years, the original Niagara Falls Shredded Wheat was the only one we carried. They still ask for it as Shredded Wheat. When customers who know there are two items of a similar nature want the Kellogg product, some of them ask for Kellogg's Whole Wheat Biscuit, and some of them do not. Some of them ask for shredded whole wheat biscuit and others ask for Kellogg's shredded wheat. Since the Kellogg biscuit came out, I have regarded that as a shredded wheat biscuit. Originally, there was the one Shredded Wheat Biscuit I knew for a great many years. I have been in business twenty-four years and have known Shredded Wheat all that time. That is the name by which it was always asked for.

Two or three years ago, the Kellogg people brought me this box, opened it, showed me what was in it and that they had a shredded wheat biscuit. They told me it was a shredded wheat biscuit, compared it with the one made by the National Biscuit Company, and told me they had three more biscuit in the box, and some other points of difference that would help me sell it. There was a little edge on the price, and I think there is now a little differential in the price. We get a quarter for two of the Kellogg's. Under ordinary conditions, we sell Shredded Wheat for the same. On sales, we often have it down as low as nine cents. We never have sold Kellogg's for nine cents.

Sometimes we have had Kellogg's shredded wheat biscuit, Pep, and probably Corn Flakes, in a combination sale, three for thirty or twenty-nine cents, and gave them a booklet or something in that. That is not an unusual way to help introduce or push a new prod-

uct. I think it is a very good system. It is very often used; sometimes, to encourage a slow-moving product, combining it with two good items, encouraging the movement of the slower article by getting it circulation.

We carry Kellogg's wheat on the shelf very near the other one in our store, both on some sort of display, on a shelf in back on the side of the store. We have all the cereals on one side. One reason for putting Kellogg's shredded wheat in stock was that Shredded Wheat was not moving as fast as we thought it should. Often, if you get a new line you think has more inducement for people to buy it, it will stimulate the sale. It is difficult to say whether that has been the result here, whether any more people than before are buying shredded wheat. We sell, at the present time, most of the National Shredded Wheat. It is still a pretty good seller. I imagine there has been a large market for it created by national advertising. I have seen their advertisements through a great many years. We also carry the National Biscuit Company's crackers. I am a member of Associated Food Stores, not a voluntary chain, a buying exchange, co-operative. We operate our own warehouses. My understanding of a voluntary chain is a chain controlled by a wholesale grocer, a jobber-sponsored chain. This is an association of independent retailers. Our combination is merely for the purpose of purchasing economically. We are our own jobbers, have a warehouse and headquarters and concentrate our purchases. The purpose is volume and better management. The National Biscuit Company recognizes that combination with various discounts.

RE-DIRECT EXAMINATION.

THE WITNESS: I cannot say what of those stores carry the Kellogg's Whole Wheat Biscuit. In that group, every man minds his own business, and he has

nothing to say about what the other man shall handle. They simply pool their orders. Otherwise, they are independent.

All these methods, such as combination including Whole Wheat Biscuit, counter displays, and so forth, I believe would have a tendency to help introduce a new product like Kellogg's Whole Wheat Biscuit to the general public. A concern like the Kellogg Company, handling many different products, can and does advertise its new products on the cartons of its old products. I believe that is practiced by a good many manufacturers.

THOMAS W. LAUGHLIN.

Deposition taken at San Francisco, California,
February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am forty-four, live at the Ambassador Hotel, and am chef there. It is a second-class hotel, located at Eddy & Mason Streets, San Francisco, with two hundred and fifty rooms. We handle all the Kellogg products in that hotel, among them Kellogg's Whole Wheat Biscuit. They are served every day in the restaurant of the Ambassador Hotel, since we have changed over to them, I think, about four months ago. We had some of the Niagara Falls or original Shredded Wheat at that time, until we ran out. We have not renewed our supply of that product. I do all the buying. I bought Kellogg's Whole Wheat Biscuit because I think they are a better biscuit. I like the way they are packed in the individual package, more sanitary and kept fresher that way. They are served in the carton to the table. People see what they are getting. I really think they are better biscuit. People seem to like them better. We have had a better sale since we put them in.

We have had no complaint from customers at all about Kellogg's biscuit.

Our waiters take the biscuit to the table in the individual Kellogg carton. The biscuits are removed from the carton in the customer's presence. They see what they are getting. The biscuits are mentioned on our menu cards. Occasionally we have little specials, Biscuit with sliced bananas or pineapple. The name Kellogg is mentioned in connection with the biscuit. At the better class houses, it is the customary practice of the restaurant trade to serve products like biscuit and corn flakes out of the carton in the presence of the customer. I have handled the Kellogg biscuit in different places. I did not like the other, because, after the package is opened and standing, if they are not served at once, they seem to collect moisture and get soggy, unless they are put in the oven and dried out. It is not as good a biscuit as the other, not so crisp and dry. You get better results and more satisfaction in serving. That is like practically all the Kellogg products. They have all been better sellers.

I give my orders to some representative of the Kellogg Company who stops at the hotel. I give my orders to him and the goods are delivered direct. I do not know of any jobbing houses who predominantly supply or serve the restaurant and hotel trade. Jobbers all handle Kellogg's biscuit, I think. We buy nearly all our groceries from Sussman & Wormser. I could buy Kellogg's Whole Wheat Biscuit through any jobbing house. I think they would sell it to me in small individual cartons. The use of individual or small cartons helps the sale of cereal products. We have built up quite a bit since we put them in. People seem to like them better after they have tried them out. The service looks a little better. They see they are getting it fresh right out of the package that way. It stands to reason they are more sanitary. The product keeps

cleaner and fresher in a small carton. If you tear the top off the box, it is exposed to the air. I do not think the name Kellogg on the carton would hurt the sale of that biscuit. I think it would surely help it. It is a well-advertised brand.

Since putting in the Kellogg biscuit, we have stopped buying Niagara Falls Shredded Wheat. We are not using it any more. There is a little difference in size between the two; but I think the Kellogg biscuit is a superior biscuit to the other. As far as size goes, there is not much difference in size or shape. It is a little smaller, more oblong, and a crispier biscuit than Shredded Wheat. I think both the Niagara Falls and Kellogg biscuit are shredded wheat biscuit. In that sense they are both shredded wheat biscuits. I felt I did not wish to carry two kinds, so I dropped the Niagara Falls and put on the Kellogg biscuit. There was no use carrying two. We got a little better sale with the Kellogg. I like the quality of the Kellogg biscuit better than that of the old biscuit. Except the size and crispness, they are both shredded wheat. I did not notice any other difference in taste or appearance.

CROSS-EXAMINATION.

THE WITNESS: Before I took on Kellogg biscuit, I was selling Shredded Wheat in the large package. I did not know there was an individual package of shredded wheat, aside from Kellogg's. I never saw the package, Defendant's Exhibit 1. I have always got the large package. I did not know they put it out small. If I had known it, I could possibly have gotten that size in Shredded Wheat.

I obtained my supplies of Shredded Wheat through a jobber. I never got them direct from the National Biscuit Company.

I have been with the Ambassador Hotel for about six months. Before that, I was at the Gowman Hotel,

Seattle. They had both Shredded Wheat and Kellogg's biscuit there. We were using the large package of Shredded Wheat, and the large package of Kellogg's biscuit. I had never seen the biscuit put up in the individual package until I came here. I believe a Kellogg salesman called on me, solicited my business, and showed me his biscuit in the small package. I tried it out.

I do not know whether the price of the Kellogg biscuit is greater or less than that for Shredded Wheat. I have no menu card with me. The Kellogg people furnish little printed specials, Kellogg's Shredded Wheat Biscuit with sliced bananas or with pineapple, to pin or clip on the menu.

If a customer in the restaurant asks for shredded wheat, we serve shredded wheat. We do not have the other, so we serve them Kellogg's Whole Wheat Biscuit. That is what is specified right in the menu. I think it says Kellogg's Shredded Biscuit. If the customer asks for shredded wheat, he gets Kellogg's biscuit.

I have been in this line of business in various parts of the country about twenty years. During all that time, I have been more or less familiar with Shredded Wheat. All restaurants carry it. When they carry it in the large package, it is put in a dish for the customer without the package. In Seattle, that was true of both Kellogg's biscuit and Shredded Wheat. Nowadays, nearly all cereals are put up in individuals; but you get a little better price in bulk in the large package. Some serve it that way, and others use the little package brought out to the table.

I did not know about either product being in individual packages until my experience here, in all my twenty years. I do not have anything to do with the pantry work. The cereals are not handled out of the kitchen. I do not pay much attention to it. I am the

buyer, and I have been the buyer before in lots of places. Some places the steward does the buying.

RE-DIRECT EXAMINATION.

THE WITNESS: When I heard of the biscuit in individual cartons, I regarded that as quite an improvement for the restaurant trade, and I was happy to buy those biscuit in the individual cartons. It was nicer service. I believe it stimulated demand for shredded wheat to serve it in that way. We expect to continue to serve it in the individual cartons. We like them better, with the advertisement of the maker going right to the consumer.

JOHN TIEDEMANN.

Deposition taken at San Francisco, California,
February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am twenty-two. I work for Tiedemann & McMorran, wholesale grocers, a concern about eleven years old. The Tiedemann in that concern is my father. We serve institution trade: restaurants, hospitals, state and federal government, eating houses, and hotels.

Tiedemann & McMorran handle products of the Kellogg Company of Battle Creek, Michigan, the general line, including Kellogg's Whole Wheat Biscuit. I would say they have serviced that to their trade since it was put on the market, approximately three years ago. We carry the whole wheat biscuit in both sizes of cartons, the large and the individual. I would say we have been instrumental in introducing that product of the Kellogg Company to the attention of our customers and getting them to buy it. We sell it to our trade in

considerable amounts. There is a demand among the trade for Kellogg's Whole Wheat Biscuit which has existed since it was put on the market, to my knowledge.

We have regular salesmen who solicit orders from hotels, restaurants, and institutions. We have handled the Niagara Falls Shredded Wheat in the past, and we still handle it when we have calls for it, in certain instances. Most of the calls, however, are for Kellogg's Whole Wheat Biscuit. We distribute samples of the Kellogg biscuit to our trade. I personally am not in charge of the sale of Kellogg's Whole Wheat Biscuit to these institutions. My source of knowledge in regard to it is through watching the sales, solely, as they come under my observation.

In serving the product in hotels and restaurants to which we sell them, as far as I know, most of them take the carton and cut it with a knife and place it before the individual, and the individual or the waitress empties it. I would say I have known of the servicing of restaurants and hotels with individual cartons for five years. The sale of cereal products in the individual cartons is on the increase. Kellogg's Whole Wheat Biscuit has a substantial distribution in hotels and restaurants throughout my territory. My traveling men take in from King City, California, to the Oregon line. King City is about two hundred miles out of San Francisco. The Kellogg Company have furnished us with advertising matter for use in selling Kellogg's Whole Wheat Biscuit. They cooperate with us very much in the sale of the product.

CROSS-EXAMINATION.

THE WITNESS: I have been with my father's house five years, since I was about seventeen years old. I am not a college man. I suppose you might call me a

buyer. I have held various positions with the firm. I am with the firm for the purpose of learning the business. I have worked in various departments of the house, and I have been on the road selling part time, by myself. At present, I am in the purchasing department. I am not the head buyer.

It is the practice to serve individual cartons in restaurants, ninety-nine times out of a hundred, because it is the most convenient way and they do not open the larger packages, for the reason they would go stale. If they got a call one day for a certain product, it would probably be stale the next day, if they did not use it up. I have been among the various restaurants and hotels and have seen it. I eat in restaurants and cafes and occasionally order cereal. I never ordered shredded wheat in a restaurant. I have never had it served to me in an individual package. When we have a call for Shredded Wheat, we pick it up from a competitor, some other jobbing house. We no longer buy it at the National Biscuit Company, but we did. We do not carry it in stock regularly any more.

If we had an order for Shredded Wheat, we do not sell it with Kellogg's Whole Wheat Biscuit. We do a good deal of bidding on Government departmental contracts. We supply the Naval base and Government hospitals. They issue specifications when they are ready to purchase supplies, which sometimes call for Shredded Wheat. When we get an item like that on an invitation to bid, we just put in the brand Kellogg's, and our price and the size package. It is not altering the specification at all. We just write Kellogg's into the specification. I cannot say that definitely, because I do not do that work. I have seen Kellogg's written in, but I would not say whether it was done all the time or not.

We sometimes get invitations to bid from a public institution with specification of Shredded Wheat, 36 cartons to the case. In that event, our house changes

the size to twenty-fours, because Kellogg's is packed twenty-four to a case. I cannot say whether the Navy base would accept a bid like that with a change in the specifications, but the Government department do accept bids of that sort with those changes in the specifications. We get contracts for them. If a Government department or specification calls for Shredded Wheat, thirty-six cartons to the case, we change that and supply them with Kellogg's. We do not attempt to obtain Shredded Wheat made by National Biscuit Company to fill that order, unless the specifications have not been changed to read Kellogg's. If they are changed, they are changed by our man.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know whether the specifications usually say "shredded whole wheat biscuit." I understand the Kellogg's Whole Wheat Biscuit to be a shredded wheat biscuit. If I got an order for Kellogg's shredded wheat, I would fill it with Kellogg's shredded wheat biscuit. We do get orders for Kellogg's shredded wheat and do fill them with the Kellogg's Whole Wheat Biscuit. I do not have personal charge of the making or receiving of bids.

CARL DUBAC.

Deposition taken at San Francisco, California,
February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a restaurant keeper, and I have been in the business for the last fifteen years. I have my own restaurant, the Busy Bee, and I have the John Cold Day with a partner. I operate the two restaurants, located at 141 Montgomery and 537 Sacramento.

I serve my restaurant customers with products of the Kellogg Company of Battle Creek, Michigan, and I have done that ever since I came to the Busy Bee. As far as I can see, the people demand Kellogg products, and they name the products like cereals and shredded wheat biscuit. We do not have any trouble with it. We sell plenty of it. I handle Kellogg's Whole Wheat Biscuit in both the small and large cartons. I keep it in the larger packages, because we could not afford to buy a case containing a hundred packages. We do not sell it fast enough and it would get stale. We buy it in large packages in order to have them fresh. Now I understand they are putting out packages a hundred to a case, mixed kinds. In that event, I prefer to have the small packages, individuals. I have the individuals in my store, of Kellogg's Shredded Wheat Biscuit. We display small packages in a conspicuous place and serve a small package to the customer, opened before the customer, so the people can see what they are getting. The small cartons help keep the product fresh. We can use four or five different kinds in a hundred-package case, which keeps fresher than if I get one kind. A package containing one hundred Grape-Nuts takes too long to sell. I can serve people fresh cereal if I have twenty packages of each. The Kellogg Company has lately furnished those combination cases. As a restaurant man, I regard that as an improvement in service. I suggested to the agent from whom I buy them that it would be to their advantage and ours to put five or six different kinds in a hundred case package, because we can use them fresh and there will be bigger demand. If you get stale cereal, you will not come back; but you will naturally go back to the restaurant where you got a fresh package. For that reason, I like twenty of each, so we may have fresh cereal right along.

To my knowledge, the practice of serving cereals in individual cartons in the restaurant trade is an increasing practice. It is becoming a general practice in the restaurant and hotel trade. Lately, the cases of cereals I purchase from the Kellogg Company contain an assortment in individual packages. I have not had complaints from my trade, to my knowledge, from servicing them with Kellogg's Whole Wheat Biscuit in individual cartons. Many times I hear the customer ask for Kellogg's. They say at times to give them some cereal, Pep, corn flakes, or rice or shredded wheat. At other times they are calling for Kellogg's. Some time ago I handled the National Shredded Wheat. I do not handle it at present. When I did, that was served in the large cartons. The National Shredded Wheat came in individual cartons also. The only reason I discontinued that is I could not use one hundred packages of each at a time. Consumption did not justify my buying one hundred at a time. Naturally, if I could buy an assortment, I would prefer it.

CROSS-EXAMINATION.

THE WITNESS: I had the Shredded Wheat ever since I opened the business. I have some now. Right now, I have a Shredded Wheat in my display all day long. I have customers who ask for Shredded Wheat, and I serve it to them. I have no individual Shredded Wheat packages at present. I bought some, but I have some in larger cartons, and I am trying to use that first. I serve the biscuit in a dish. I have also the larger size Kellogg cartons. I am serving those too. I take them out and put them in a dish. In front of the people I keep them in the case. We take the Shredded Wheat right out of the larger package and put them in the dish right in front of the customer. They see me do it. I know I can obtain Shredded Wheat in individual packages like Plaintiff's Exhibit 21. We never

could get them in broken lots before. Lately, we are getting an assortment in the hundred-package case with Shredded Wheat included.

We have printed menus in our restaurants. We do not carry the cereals by name. We just have Shredded Wheat on our menu card. This is one of our Montgomery Street menus, which carries "Shredded Wheat with cream, fifteen cents." If a customer comes in, looks at that card, and asks for Shredded Wheat with cream, he gets whatever is in front: Kellogg's or Shredded Wheat. In that event, he does not get National Biscuit Shredded Wheat, because I have none on hand. I do not think I have National Shredded Wheat in my case at all. I would have to look and see.

If we had both products in our case and on the menu card, and the customer asked for a bowl of Shredded Wheat, the waitress would ask him what kind of shredded wheat, Kellogg's or the National, when we had that. Naturally, if we have both products, I and my waitresses will recognize two kinds of shredded wheat. She will ask what kind of shredded wheat they want, and then they tell her. Generally, if they ask, we try to have both, to maintain the business. I really do not know if we have both kinds on hand now. Sometimes the customers say "Kellogg's shredded wheat" and sometimes, occasionally, a customer will say "National Shredded Wheat." They do not always say just shredded wheat. Sometimes they do.

As long as we have individual packages and now have an assortment, we carry more of Kellogg's biscuit than of the National. I do not know what the National sell besides Shredded Wheat. I have been familiar with Shredded Wheat for the last thirty years. I was eighteen years with the Southern Pacific commissary or dining-car department. They bought Shredded Wheat

to serve on their cars and they bought individual packages, for a good many years. During all that time, until Kellogg's Whole Wheat Biscuit was put on the market, I knew Shredded Wheat and just the one item, which meant, to me, the package with the picture of Niagara Falls. The general public was pretty familiar with Shredded Wheat, and they asked for Shredded Wheat repeatedly, surely. I do not remember any other biscuit except Shredded Wheat like that pillow-shaped biscuit. I remember Shredded Wheat. I used it on the ferry boats about thirty years ago. As I remember, that was the name it was always called by. Plaintiff's Exhibit 164 is the menu card I just identified.

RE-DIRECT EXAMINATION.

THE WITNESS: When I speak of shredded wheat, I have in mind that shredded wheat there, Plaintiff's Exhibit No. 1, one of these pillow-shaped biscuits. That is what I mean by shredded wheat. The Kellogg Company is making that kind of biscuit, and the National Company is also making that kind of biscuit.

I am not solicited by salesmen of the Kellogg Company to buy their products. I do not come in contact with the Kellogg sales organization. I buy from my grocer. I get the individual cartons from Lyma-Scheer. I call them and order the assorted case. I say I would like to have so many packages of shredded wheat, so many of Grape-Nuts, and Rice Puffs, and so forth. Sometimes the salesmen come around. Kellogg's Whole Wheat Biscuit was first introduced to me by some of the customers wanting Kellogg's. They asked for it, and others asked for the National. When I got requests for Kellogg's Whole Wheat Biscuit, I placed orders for it with my jobber.

MARK B. CONNELLY.

Deposition taken at San Francisco, California,
February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocery merchant, doing business under the name, Pay'n Take It Grocery and Crystal Palace Grocery Shop. One store carries approximately twelve to fourteen thousand dollars of stock, and the other one six to eight thousand. The larger store is the largest store in San Francisco. The other one is approximately next to it. I have been in the grocery business in my own name, approximately five years. I have been in the grocery business generally more than twenty years. My stores are cash-and-carry grocery stores. A customer comes in and picks up a basket, walks up and down, picks up articles, takes them to the cashier's desk. Boys at intervals around the store might suggest articles to them, or there may be sales people demonstrating and selling them articles.

We handle the entire Kellogg line of products in our stores, including Kellogg's Whole Wheat Biscuit. That is a shredded wheat biscuit. There is more than one concern, to my knowledge, making a shredded wheat biscuit at the present time: the Shredded Wheat Company, or the National Biscuit Company, and the Kellogg Company. We handle both those types of shredded wheat biscuit. We have displays on the shelving and also on the floor space. One of them is rather high for some people to reach, so we have stores large enough to make a floor display on both, or a full line of cereals. Those two products are displayed in the cereal department of my stores.

We have handled the Kellogg's wheat biscuit four or five years, since we have been in business, contin-

uously. About one in four or one in five customers select the Kellogg's biscuit, as compared with the ones who pick out the National product. I would say there is a genuine consumer demand in my store for Kellogg's Whole Wheat Biscuit. We have had men come up there, open up packages, and demonstrate it. The name itself has sold the full line of products, as far as my store is concerned, at all times, the Kellogg name. Without hesitation, I would say that the Kellogg name on that whole wheat biscuit is of value in introducing it to customers. I have advertised Kellogg's Whole Wheat Biscuit in the daily papers, under the name of Kellogg's wheat biscuit. I do not think those ads had any bearing on introducing Kellogg's biscuit to customers. It sold right along, anyway. I would say the name was enough to sell it, as any advertised product sells so much of it, anyway. Any advertising has a good effect on any of our products. I have owned this one store for approximately a year. We have had no demonstrations there. Last year, in one store we had demonstrations and displays. I just put them into one store this last year. The other store I have had for four and a half years. The demonstration was in the larger store, the Pay'n Take It Store. In all my stores, the practice has been the same, the customer picking out what she wants with the help of somebody or demonstration or something suggesting it to them. There may be some demonstrator in the store at all times. There may be somebody there five days a week or six days a week. The demonstrator will open up an edible product and sample them to consumers or show them how the product is to be used at home or how to use it to their advantage and talk on the product as much as they can. That form of demonstration has been given in my stores on Kellogg's Whole Wheat Biscuit.

I carry the National Biscuit Company's crackers, cookies, and Wheatsworth products; but I buy my Shredded Wheat from a cash-and-carry wholesale chain store. I have made it a practice to buy my Shredded Wheat from the wholesale house at all times.

The Kellogg salesmen take my order on the whole Kellogg line, including the Corn Flakes and Pep and Whole Wheat Biscuit. They take the order to the jobber and he fills it and sends it out. As far as I know, Kellogg's products have been distributed successfully through jobbers. At the present time, I am buying the National Biscuit cracker line through a buying organization. I have bought it direct, but the buying organization gives me an advantage. There is no other wheat product to my knowledge in competition with these two brands of shredded wheat. I handle Wheaties and wheat flakes. I would say that the average customer shifts from one cereal to another at times. In that sense, I would say that different wheat products compete with each other to a certain extent. A customer who changes from shredded wheat to wheat flakes is, for the time being, probably loat to shredded wheat.

I do not know any other name for shredded wheat or shredded wheat biscuit or shredded whole wheat biscuit, as a common descriptive name for that product that would tell anybody what the product was. You have covered it all right there.

CROSS-EXAMINATION.

THE WITNESS: It is true that there are a hundred or more dry cereals on the market. In my opinion, when you are talking Shredded Wheat or shredded wheat biscuit or whole wheat biscuit, they are not the same kind of thing as Post Toasties or Corn Flakes or Wheaties. A hundred of them would be too gen-

eral. Whole Wheat or shredded wheat biscuit are used more exclusively by certain classes of people. Wheatus seem like a different commodity entirely.

I have been in business more than twenty years and I have known Shredded Wheat all that time and before. I was in the Middle West. We did not use as much of it as when we moved to Montana and the coast. I have known Shredded Wheat for a long time.

There is no doubt that Kellogg's Whole Wheat Biscuit competes with Shredded Wheat, and that Kellogg's Whole Wheat Biscuit answers the call of the Shredded Wheat customers. I am buying the National line through a wholesale grocery house, Kockos Brothers, because I get a better discount at the time I buy, instead of waiting a solid year for it. I do not belong to them, pay any dues, or have any connection with them. He gives me the full discount and bills it to me. The National Biscuit Company recognizes that privilege on my part.

I do not buy my Shredded Wheat that way, but from the Equitable Cash Grocery.

Without any hesitation I would say that the Kellogg name has a reputation that helps sell their products. There is absolutely no doubt that the Kellogg name on a package of Whole Wheat Biscuit is a good recommendation. I do not know whether our Kellogg package of Whole Wheat Biscuit has a window in it, because I just do the buying. I think it is the other one. That side looks more familiar to me, with the picture of the biscuit in the dish. I have been in the retail grocery business in my own name for five years, but I can go back twenty years that I have been associated with the grocery business. I have been traveling on the road. Previous to being in the grocery business, I had spent considerable time on the road.

Our store is self-service, but we have some boys in the aisles to assist customers. At all times we offer to assist them. Some of them decline it and lots of them accept. On certain days we may attempt to apply a little salesmanship in connection with the self-help. We have approximately ten thousand customers on Saturday, so you can imagine it would take plenty of help if I had to do that for all. My customers do not have to follow a regular track. Mine is criss-cross always. They can go in any part of the store. One of my stores is a hundred and twenty-six feet deep, forty-two feet wide. The other store is about one hundred by sixty, the selling space. I can criss-cross them and they can go any way they want in the store. My customers sometimes have to be told where to go. We display the Kellogg Whole Wheat Biscuit and Shredded Wheat Biscuit with the cereals. They are all in one place, or two or three places. Our stores are big enough to have two or three places. The customer goes to a given zone where the cereals are, and she can exercise her own choice which one to take; except that we might have a demonstrator there who would be working on a product and would try to distract her attention from one product to another.

MRS. CHRISTINA S. MADISON.

Deposition taken at San Francisco, California,
February 9, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am an editorial woman doing publicity and things of that sort. I have one son. I have met Mr. West of the Kellogg Company twice, and I am here today on his invitation. I do not know anybody connected with the National Biscuit Company.

I have no bias or prejudices one way or the other between the National Biscuit Company and the Kellogg Company. I know and use the Kellogg's Whole Wheat Biscuit. I have used it, I think, about two and a half years. I had a package out at the Food Show in the fall, I think, about two years ago. I used the package and liked it very much. I had previously used the regular Shredded Wheat, the other brand. I personally like Kellogg's biscuit better. I think it is quite different in flavor. I would say the Kellogg product was a shredded wheat biscuit, because it is a small biscuit made out of shredded wheat. I did not think it tasted the same. I have continued to use the Kellogg shredded wheat biscuit. I buy it at cash-and-carry self-service stores. I walk into the store and pick out what I want without the service of a clerk, always. That is the way I buy my Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: I was not very much of a user of Shredded Wheat before I used Kellogg's biscuit. I have bought it a long time before. I have known about it a good while. It was used in my mother's home, but I had never used it myself. In my mother's home, it was purchased in a package and served on the table in a dish. I knew it when I was a child, as shredded wheat.

My husband is in the advertising business, connected with the *San Francisco Chronicle*. I do not know whether they carry advertising for the Kellogg Company. I do no advertising work for the Kellogg Company myself. I read all the papers and I see the advertisements, but I could not swear where they appeared. My husband is national advertising manager of the *Chronicle*.

FRED F. ROBBINS.

Deposition taken at Los Angeles, California, February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am forty-five years old, a wholesale grocer. I have been in that business twelve or fourteen years. My concern is the Hoagland-Robbins Company. Our method of wholesaling is usually cash-and-carry. We have a general warehouse, a central warehouse and branch cash-and-carry depots scattered over strategical points. We make the deliveries from our main warehouse to our branch depots, merely to keep the branch warehouses stocked. There is no general arrangement. It is naturally governed by conditions, the building, size of building, and various things entering into it. The merchandise is usually placed in sections. Where space will permit, cereals are usually placed in one section, soaps in another, and so on. The customer goes into the branch and takes his own merchandise. He does not, as a rule, go into the warehouse and pick it up. He is generally waited on by a man; but he goes to the desk, gets his order, and pays for it, and takes it away. Our man usually assists him in taking the merchandise out. If the man is busy or in a hurry, he may wait on himself if he likes and if he knows the location of the stock. The merchandise is usually handled in case lots.

We handle Kellogg's Whole Wheat Biscuit and have had it two or three years. I know what kind of product is contained in the packages. I would describe it as a shredded wheat. I do not know of any other name that describes it as well as that. I handle the other shredded wheat, formerly put out by the Shredded Wheat Company, but only in a small way, simply because they have a policy of selling directly to the retailer, which takes it away from the jobber.

I have little demand for Niagara Falls Shredded Wheat. We have not noticed any confusion between the two products. We have not, to my knowledge, had any customer return either one desiring the other. I am not as familiar as I might be with things that go on in the warehouse, because my duties are in the office.

If people come in and say "Give me Kellogg's Shredded Wheat," or "Give me Shredded Wheat," we usually know what they want, from past dealings with them, and we give them what they want. We sell a great deal of Kellogg's products. We consider that there is a demand for the Kellogg's Shredded Wheat or wheat biscuit.

We service the restaurant trade, indirectly. We have restaurant supply houses that buy our supplies from us, selling directly to the restaurants. Those restaurant supply houses buy the Kellogg Whole Wheat Biscuit from us. They buy them in the individual size cartons, packed in boxes. The restaurant supply houses buy Kellogg's Whole Wheat Biscuit from us in cases with the individual cartons in. That is the only way in which we service the restaurant and hotel trade.

CROSS-EXAMINATION.

THE WITNESS: I have been in the grocery line fourteen years. I had no experience in it prior to that time in the field. I have been familiar with Shredded Wheat for a good many years. Before the National Biscuit Company took it over and began distributing it, we carried it in quantities. Before Kellogg's put up what they call the Whole Wheat Biscuit, we carried Kellogg's shredded wheat biscuit. I do not know when that change was made. It was some few years ago. We carried Kellogg's biscuit I would say immediately after they put it on the market. That was a long time after

we had been carrying Shredded Wheat. It is perhaps fair to say that I was familiar with Shredded Wheat before I was in the grocery business. It is and has for many years been a well-known product. I always knew it by the name of Shredded Wheat. For a great many years, when my customers sent me in an order, written or oral, for Shredded Wheat, that is what I used to fill the order. I would not say that it is true that if a customer merely asked for shredded wheat, I would know what he meant. Since the Kellogg Company has had a product on the market, we do not consider Shredded Wheat as meaning the one product. If we get an order for shredded wheat at the present time, we usually give them Kellogg's Whole Wheat Biscuit, without any inquiry as to whether they mean Kellogg's or something else. I may not be as familiar with it as those men working in there. You cannot control ten or fifteen men. One of them might give Kellogg's and the other one might not. One fellow might consider it so, and the other fellow would not. I would not say it was a general policy that would be followed. I am answering, merely, from what is in my own mind. There might be some confusion between the two products with somebody else, but not to myself. I know there are two, and if a customer comes in and asks for shredded wheat, my impulse is to give him the Kellogg product, because that is what I carry. Naturally, we carry them and we would not want to miss the sale. We carry Shredded Wheat now in a modified way. It is so small, I might say we do not really carry it. I was just noticing the other day an invoice that came through for five cases. That is the first time I noticed any in some little time. A customer would have to specify Shredded Wheat made by the National Biscuit Company or he would get Kellogg's, perhaps, on account of the fact that we carry one principally.

Prior to about the year 1927 or 1928, we had only the Shredded Wheat Company's Shredded Wheat or National Shredded Wheat, and that is a product I had known prior to that time for a great while. At that time, it was always asked for as Shredded Wheat.

If somebody asked me to describe Cream of Wheat, not knowing the manner of manufacturing it, we frequently say it is similar to Cream of Wheat or like Cream of Wheat. That seems to describe what we are trying to say. Likewise, in describing the Kellogg's products, I would say it is shredded wheat. It looks like it, is made in the same shape, I think; but I do not know that they have the same color or the same size. I have not examined them lately. I would say either one of the products would fill the same want. I think the Kellogg Company have changed the name and no longer call it shredded wheat. I believe they call it Whole Wheat Biscuit. So they have evidently found another name for it besides shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: I would not say that Whole Wheat Biscuit is as descriptive of what the product actually is in the general minds of the people as is Shredded Wheat or Shredded Wheat Biscuit. I stated to Mr. Vilas that the Kellogg product, in my opinion, is shredded wheat. That is what it looked like. If I were asked to describe the Kellogg product, physically speaking, I would say it is shredded wheat. I do not recall having noticed any advertisements of either of the shredded wheat products in this market, by either retailers or wholesalers.

RE-CROSS-EXAMINATION.

THE WITNESS: I think the name Shredded Wheat describes the product better than any other name. I have shredded coconut, and it is shredded the same

way. It is in long shreds. You can shred it long or you can shred it short. I do not know that I ever gave the word *shredded* ~~rose~~ analysis. I never went to the dictionary. I have an idea what it means. I think it means to tear apart in small pieces, into shreds. I do not know how Shredded Wheat is made. Assuming that the wheat berry is pressed by strong compression rollers into a long string, I would not say that that is a shred. I would think that shredded would mean cut. That is the general or usual or accepted meaning of the word. I would not say it was shredded if it were rolled into a string.

MRS. BLANCHE STEINER.

Deposition taken at Los Angeles, California, February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife. I do not know anybody connected with either the National Biscuit Company or the Kellogg Company very well or personally. Mr. Hoover, who I understand is a Kellogg salesman, asked me to be here today. I do not know anybody connected with either companies. My acquaintance with Mr. Hoover would not influence my testimony in any way in the case. I do not know him personally. I have just met him in the restaurant.

I am familiar with the product known as Kellogg's Whole Wheat Biscuit. I use it and have used it approximately six or eight months. I bought it from a store, as it was a Kellogg product and I have used their products, most of which are very good. I had used the other biscuit. I did not care for them so very much, and I wanted to see if the Kellogg biscuit was better. I have bought it ever since. I did not continue to buy the other biscuit.

I do not remember seeing any advertisements of the Kellogg Biscuit. I used to work in a restaurant, but I believe that was before the Kellogg shredded wheat biscuit. I personally have used the other Shredded Wheat biscuit. Since my first acquaintance with the Kellogg biscuit, I have continued to use the Kellogg biscuit.

CROSS-EXAMINATION.

THE WITNESS: I keep house. I can hardly remember when I have not seen the old Shredded Wheat. I always knew it as Shredded Wheat, and I bought it a good many times in stores, years ago. When I bought it, I always asked for Shredded Wheat; did not know any other name to ask for. It was known as Shredded Wheat or Shredded Wheat Biscuit.

I happened to see the Kellogg biscuit in a store where I happened to buy, not a store in which I was interested in any way. The clerk did not call my attention to it. I just happened to find it. It was in a large package. I could see the biscuit through the window. I think it was a package like Plaintiff's Exhibit 168. I only saw the ends of the biscuit through the glassine window. On the other side, I saw the picture of two biscuit in a dish, which looked like Shredded Wheat biscuit. I do not care so much about Shredded Wheat, but I saw this package and thought I would try it. I found it better, liked it better, and I have been using it since then. When I saw it, I recognized it was like the old Shredded Wheat in appearance. Being familiar with Kellogg's products, I thought I would try it.

RE-DIRECT EXAMINATION.

THE WITNESS: The Kellogg biscuit are not the same size as the other. I observed that the first time I used them.

PHILIP RAY RICE.

Deposition taken at Los Angeles, California, February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-three years old, the manager of a grocery store, Vick's Stores, Inc. We have three self-service stores, where the customer waits on herself. All the merchandise is displayed. When a customer comes in, she picks up a basket and starts buying whatever she wants, taking the stuff off the shelves and putting it in the basket. Then they come up to the check stand and pay for it. She takes the merchandise off the shelf herself. No clerk hands it to her.

We handle a product known as Kellogg's Whole Wheat Biscuit, which is displayed on the shelves of our store in the cereal section. I would say that product is a shredded wheat biscuit. We also handle the other Shredded Wheat, a product called Shredded Wheat Biscuit. That is also, physically speaking, a shredded wheat biscuit.

We find a demand for the Kellogg product in our store. It sells right along. We advertise the Kellogg line, Whole Wheat Biscuit among the other items. It is advertised under the name Kellogg's Whole Wheat Biscuit. Kellogg's Shredded Wheat is packed in a pasteboard carton with a cellophane or glassine front, displaying the contents of the carton. All those I have handled in the past three or four months are cellophane-front cartons. Before that there were some in a case for display purposes. Ever since I heard of Kellogg's Shredded Wheat, they packed some of them that way. I would use those for display purposes. I would say that a customer, in looking at the package, should know exactly what was in it. The appearance

of the package has a certain appeal to her. If the cellophane front were omitted, I would say that the customers would know right away what was in the package, now, after it has been on the market. A certain amount of it would be sold, regardless of whether it had a cellophane front. I think the sales would be greater with the cellophane front. The most accurate description of the product is a shredded whole wheat biscuit. There are a lot of whole wheat biscuits on the market, but they are not shredded. To my knowledge, there are two kinds or makes of shredded wheat biscuit on the market; the product that has been known for years as Shredded Wheat, now made by the National Biscuit Company, and Kellogg's shredded wheat. There are, however, a number of products known as whole wheat biscuit.

I think my stores are typical of a large number of smaller stores in this territory. I think the other stores follow generally the same practice I do in advertising new products to the consumer. We have not used other methods besides display on shelves and newspaper advertisements to bring Kellogg Whole Wheat Biscuit to the attention of our customers. We have had Kellogg demonstrations of their whole line, including the Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: I have been connected with the grocery business about fifteen years one way or another, throughout most of my business career, with the exception of seven years traveling in another line. The rest of the time I have been in the retail grocery business. I manage two stores. We have three altogether. It is an entirely independent group. To the best of my knowledge, they have no other connection.

During the fifteen years that I have been associated with the grocery business, and ever since I can

remember at all, in fact, I have known about Shredded Wheat biscuit. It has always been known by that name. It was a very well-known, nationally known product, as far back as I can remember, always called for as Shredded Wheat. There was only one item with which to fill such an order. The name described the product. Until the time that Kellogg's shredded wheat came out, that was the only product of its kind, with the exception of Muffetts, and also Triscuit, a similar product. Triscuit is made by the Shredded Wheat Company of the same material, but flat. I would say Muffetts was a poor imitation of Shredded Wheat biscuit. Kellogg's is shredded wheat.

Looking at Plaintiff's Exhibit 168 with a picture of two biscuit in a dish, that looks like a Kellogg's shredded wheat carton. On the other side there is a display window. That is the way we now carry it. Ever since I have handled it, there has been a cellophane front in some packages of every case of it. Those that did not have the window had a picture like the other side of the package. Looking at Plaintiff's Exhibit 167, I see no difference in it, except that it has no window. It has the picture on both sides. All that I have now have windows in them; so that, when they are displayed on the shelf with the window side out, you see the ends of the biscuit and the customer can see what it contains.

We carry Shredded Wheat biscuit made by the National Biscuit Company, displayed on our shelves, also. Customers come and take that, too. In our stores, the customer wanders about at will, not through definite aisles. Kellogg's shredded wheat and National Shredded Wheat are displayed side by side. One is on the end of a rack and the other is right next to it. If she comes down one side, she will see National Shredded Wheat first; if she comes down on the other side, she will naturally see Kellogg's first.

I think I advertised Kellogg's biscuit as Kellogg's Shredded Wheat once. The salesman told me that it was wrong. I called it Kellogg's Whole Wheat Biscuit after that. I do not receive telephone orders for anything like that. Many times a customer will ask for a particular item. I would not say they ever asked for Shredded Wheat. They might ask where the Shredded Wheat is. We will tell them if it is in the cereal section. Our idea is to let the customer get what she wants. I have seen the national advertising done by the Shredded Wheat Company and the National Biscuit Company. I know the item, as far back as I can remember, has been advertised quite generally as Shredded Wheat. I know how it is made. I have been to the factory at Niagara Falls. I associate Shredded Wheat with Niagara Falls and the picture of it on the box in two ways, as to cleanliness. That has been their motto over there in that plant. I have not been to the Oakland plant. I have not noticed it for some time, but they used to advertise "the cleanest and most hygienic food factory in the world."

I recognize Plaintiff's Exhibit 10. That looks like the plant in Niagara Falls. There it is: "The cleanest and most sanitary food factory in the West." They advertised that differently several years ago. They said "in the world." They are not taking in quite so much territory now. This is an Oakland carton. That building does not look like the one at Niagara Falls.

Looking at Plaintiff's Exhibit 1, I recognize that as containing a picture of the factory at Niagara Falls. That is the one with which I am familiar now. I remember seeing a carton like Plaintiff's Exhibit No. 10, with a picture of a dish and two biscuits in it in the National Biscuit Company's product. I recall that for some time back.

RE-DIRECT EXAMINATION.

THE WITNESS: All the deals for buyin ; in that line are made in the office. To my knowledge neither of these biscuit had been offered at attractive consumer prices to attract customers to them. The only specials I have any knowledge of are those I run myself. I have run specials on both the Kellogg's and the Niagara Falls. There has been a price differential between the two at different times. I would not advertise both items in the same ad unless I had the same price on both of them. I have advertised them just one at a time. When I advertise Kellogg's Whole Wheat Biscuit, I advertise the price in connection with it. I regard the price I named as an attractive price to the consumers, which would attract them to that product.

The Kellogg Company is a heavy advertiser. I would say the name Kellogg on a package is advantageous, in that it means something that would help the sale of the product to the trade, to the consuming public. Kellogg's have a color scheme of their own that they seem to carry out generally, throughout their entire line. The whole wheat carton is in the same color as the other cartons.

The self-service store is a popular type of store and the only successful type of store in this territory. They are all that way in this territory. There are a lot of them, in Southern California.

RE-CROSS-EXAMINATION.

THE WITNESS: There are a few service stores in Los Angeles, not many. I do not buy the Kellogg item or the Shredded Wheat. I do not know the terms on which it is bought by my employers.

MRS. KEITH LEE.

Deposition taken at Los Angeles, California,
February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: We own a restaurant and run it. I think you would call it a "C" class restaurant. It has a lunch counter, six booths, and dining tables. We have operated that restaurant five years.

I use in my restaurant a product called Kellogg's Whole Wheat Biscuit, and we have used it ever since we opened. We put them on at breakfast in the little individual cartons. We have them on the back bar at the back of the counter. It is decoration, and we take the decorations down. In that way, you keep the product fresh. We sell them so fast, it keeps fresh, by displaying it on the back bar. They come in and do not know what they want. They say, "I will have this" or "that." They say they want shredded wheat or whatever they happen to see they want. I have never handled any other kind of shredded wheat besides Kellogg. Men will point at the package. They say, "I believe I will have that shredded wheat up there." Maybe they will say, "You had better give me some Krispies—Wheaties." They call them Wheaties sometimes. Whatever they happen to see and they want, they say, "I believe I will have that." When they point to the individual packages and say they want that shredded wheat, I just take it down, open the top of the package, cut it so they can take the shredded wheat out themselves, put it on a little plate, give them individual cream and the empty bowl with a little plate. The customer takes the biscuit out of the carton himself. We do not touch it at all. We usually follow that practice, for cleanliness. We are handling all sorts of dishes. You cannot wash your

hands after every order, so we do not handle any food. The customer picks up the carton and dumps the biscuit into the plate. That practice has always been followed during the five years we have had the restaurant. I believe that is a state law. It was supposed to be the law that we are not even allowed to open the top of a bottle of milk. The customer is supposed to open it himself. It is a state law; but we did it ourselves for cleanliness.

CROSS-EXAMINATION.

THE WITNESS: I know about Shredded Wheat made by the National Biscuit Company. I saw it on the market several years ago, and I believe I bought it and we used it long ago, too. I just did not happen to take it up when we were in the restaurant business. There seemed to be more demand for the whole Kellogg line, Corn Flakes, and others, so I just keep the whole line. I have been using the Kellogg line for five years. The Kellogg salesman did not visit me. We stocked first out of the Smart & Final, wholesale grocers.

I have never bought any Shredded Wheat from the National Biscuit Company or the Shredded Wheat Company, although I have known about it for a good many years. Of course, I go into a shop and see it on a shelf, and I might buy it. I have used it at home.

We have menu cards at our restaurant. Cereals are listed: "Dry cereals, 10¢; pure cream, extra, a nickel." That is the only way. We do not feature them by name. As a rule, our customers see what they want and ask for it. I think we have had little stickers I have put on once in a while. If I have a great deal of Corn Flakes I want to move, I feature that. I never had to feature Kellogg's Whole Wheat Biscuit.

My customers come in and ask for Shredded Wheat, and I take down the little Kellogg's package with two biscuit and serve it to them. Sometimes they ask for it as Shredded Wheat, and sometimes they will say, "Let me see; I believe I want that shredded wheat;" or "Oh, give me some of that." As a rule, when they name it, they call it shredded wheat. Sometimes they say, "The biscuit." Half the time when a man comes in for breakfast, his mind is on his work or his paper. Two-thirds of the time he does not know what he asked for. He just says, "Give me this or that."

RE-DIRECT EXAMINATION.

THE WITNESS: When the goods are delivered from the Kellogg Company, there is a supply of the little stickers with them, for All-Bran and Corn Flakes, and, I believe, Wheat Flakes. When I want to stimulate the demand in a certain line, I put the stickers on my menu card. It helps the sale a little bit.

I have never served any shredded wheat in my restaurant out of large cartons. I just use the individuals, because I do not want them to handle it. As far as I know, it is a state law. All I know about the practice in other restaurants is that once in a while I will go out and get a job somewhere else for two or three weeks. I watch what other people do a whole lot. They seem to be doing as I do. They seem to put the full carton on the plate as I do, in the better class restaurants.

RE-CROSS-EXAMINATION.

THE WITNESS: I recognize the little box you have in your hand as the kind I have on my shelves. That is the box that is seen by my customers when they point up and say "Give me some shredded wheat." Plaintiff's Exhibit No. 169 is the carton just shown me.

HARRY FIERSTINE.

Deposition taken at Los Angeles, California, February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: My age is thirty-one, and I live at 1940 Golden Street, Long Beach, California. I am a restaurant owner, located at 631 West Anaheim, Long Beach. I have conducted that restaurant eight years this coming June. I am the proprietor. I would say it was about a "B" class of restaurant.

I have bought from the National Biscuit salesman, and I know the Kellogg Company representative. I am not conscious of any prejudices as between those companies that would color my testimony in any way. I have heard of the product called Kellogg's Whole Wheat Biscuit. I imagine it was first put in our place through their representative. I handle all the other Kellogg products. I think Kellogg's Whole Wheat Biscuit was introduced as part of the line at some time. I handle it in my restaurant, and I would say I have handled it a couple of years. I would describe it as a whole wheat shredded biscuit. There is the Kellogg's biscuit, and, I guess, the old original Shredded Wheat on the market. I do not handle the old original Shredded Wheat at the present time.

Kellogg's Whole Wheat Biscuit that I carry is supplied to me in the individual cartons, like Plaintiff's Exhibit No. 169. The cartons are displayed on a center case in my restaurant. It has a horseshoe counter, and a center case runs between the two counters. At one end all cereals are displayed, more than one carton. There is a demand for the product as service, served over the counter. We sell them to our customers. Some customers ask for Whole Wheat Biscuit and others ask for shredded wheat biscuit. We serve

the Kellogg biscuit when they ask for it by simply cutting the package and setting it in front of each customer with the bowl. We serve it that way because I think there is a state law prohibiting serving it in any other way and from touching the biscuit.

CROSS-EXAMINATION.

THE WITNESS: I am familiar with the original Shredded Wheat and have known it a good while. I suppose I remember it from the age of youth. I used to have it in my home when I was a boy. It was always known as Shredded Wheat Biscuit. It was the first product of its kind, very generally advertised. I have had it in my restaurant in individual packages. I do not buy it any more. The demand now seems to be for a whole wheat product. The original Shredded Wheat, to my knowledge, is not a whole wheat product.

I recognize the carton Plaintiff's Exhibit 1. I never read the printed matter on it. Looking on the back I see that it says it is a whole wheat product "Made of whole wheat; nothing added or taken away." Now, I believe, I realize I was mistaken in thinking it was not a whole wheat product. Another reason I ceased using the Shredded Wheat is that Kellogg's biscuit is a smaller, handier biscuit to serve. I find it handier to put in a bowl or saucer. To my knowledge there is no difference in the price to me, and I sell them at the same price I did the original Shredded Wheat. Our customers do not usually ask for shredded wheat. Some do and some ask for Kellogg's Whole Wheat Biscuit. They usually point to the package. If a customer asks for Shredded Wheat in my restaurant, I always tell him we have Kellogg's Whole Wheat Biscuit. It is sold in the original package. It has always been sold in the original package, so there is no doubt in their mind what it is. The invariable practice in my

restaurant when they ask for Shredded Wheat is to give them the Kellogg's biscuit and always tell them it is Kellogg's Whole Wheat Biscuit. You have to do that with any product. If they ask for a bottle drink like a Delaware, you tell them you have a Grape Drink but not the original Delaware. You have to do it.

When they ask for Shredded Wheat, if they ask for the original Shredded Wheat, I feel I have to tell them I am giving them something else. A customer seldom uses that language. He comes in and asks for Shredded Wheat, which does not necessarily, in my mind, apply to any particular biscuit that is shredded. It does not apply to the original package necessarily. I think it applies to any biscuit that is made in the same way. Nevertheless, I tell them we have the Kellogg's Whole Wheat Biscuit. I feel that I am giving them something that I must explain to them. Otherwise, I would not do that.

We have menu cards in our restaurant, of which Plaintiff's Exhibit 170 is one card currently in use. It is made of green cardboard, and there is clipped to it a typewritten sheet dated February 9th. That is one that has been in use recently. On the printed part, under the head "Cereals," is: "Pep, Corn Flakes, All-Bran, Rice Krispies, Shredded Wheat, Grape Nuts, with bottle of milk, 15 cents." Those are the dry cereals we have on our counter. Except for Post's Bran, I think all the others are Kellogg's. Puffed Wheat is not Kellogg's and Grape Nuts is not Kellogg's. That is right. But Pep, Corn Flakes, All-Bran and Rice Krispies are Kellogg's products.

In the same line with Rice Krispies and Puffed Wheat, the words "Shredded Wheat" appear. When thy customers ask for shredded wheat with reference to that name, I give them the Kellogg's Whole Wheat Biscuit. When it is set before them, there can be no question in their minds what it is, the original package.

I have two people helping to serve in the restaurant besides myself. I do some as extra work. There are no instructions to the help to specify Kellogg's. It is all served in the original package.

If you went in there today and said to my waitress or waiter, "Give me shredded wheat," he or she would take this little individual package of Kellogg's product and hand it to you to help yourself without saying anything about it. The chances would be that she would do that. Plaintiff's Exhibit 170 is the menu card I identified. I was asked to testify here by Mr. Hoover, the Kellogg representative. I obtain some of my supplies through him. He is the specialty man. The supplies are obtained through a wholesale house. I have some contact with him as specialty man for Kellogg's.

RE-DIRECT EXAMINATION.

THE WITNESS: I regard Kellogg's Whole Wheat Biscuit as a shredded whole wheat biscuit. I think any biscuit put up in that form is a shredded wheat biscuit, regardless of who makes it. When I put the individual package down in front of a customer, that package would tell him it was a Kellogg product. It could not do otherwise.

MAURICE J. RIFKIN.

Deposition taken at Los Angeles, California, February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am cashier and clerk in the Bankee Market, in Burbank, at 102 West San Fernando Street. That is the only store called Bankee Market. My father is the owner of it and I work for him. It is a self-service store where a customer comes in, takes a basket, picks out what she wants, is checked out and

pays for it at the door. She takes just what she wants and nothing else. She does not have to go through any aisles at all, unless she wants to get something in a certain place. They are all marked.

I know a product called Kellogg's Whole Wheat Biscuit very well. It is very well known in this market, to my knowledge. My father handles it in the store where I work. We have had it ever since we have been there, about a year at that market. I have eaten the Kellogg biscuit. It is shredded whole wheat flake, apparently a whole wheat biscuit just shredded, well toasted, a regular whole wheat biscuit.

We handle another shredded biscuit besides the Kellogg, just shredded biscuit. I believe it is made by the National Biscuit Company.

Kellogg's shredded biscuit is displayed with all the other cereals. The National Shredded Wheat is also in the cereal section, but there are three sections containing cereals, and they are not next to each other. They are all in the cereal section. Other cereals displayed near it are Kellogg's All-Bran, Pep, and Whole Wheat Flakes. Kellogg's products are all in one place, in a Kellogg section. The National Biscuit Shredded Wheat is in another section of the store, in the cereal section, one section away from Kellogg's. Kellogg's Whole Wheat Biscuit on our shelves are in the regular cardboard carton. They have one kind, a display package with a cellophane front, like Plaintiff's Exhibit 168. The Whole Wheat Biscuit are not all in packages like that. Some of them are just plain cartons without any cellophane front. The cellophane-front cartons are left by the salesman. They are packed in the case. Each case contains at least one. The others are ordinary cartons like Plaintiff's Exhibit 167. We have handled the Kellogg's biscuit since the store has been opened, a year and a month. During all that time, we have had Kellogg's Whole Wheat Biscuit in our store. There

is a demand for them among the consumers, who go and pick it up whatever they want. If they want Kellogg's Whole Wheat Biscuit, they pick them up and put them in their basket.

Kellogg's Shredded Wheat Biscuit have been sampled and there have been demonstrations on them. The demonstrator is right in the store and shows the product to the consumers as they come in. If they want to taste it, they may. We advertise in the paper. About once a week we advertise some Kellogg product. We have advertised Kellogg's Whole Wheat Biscuit under that name to the public. I do not know anything about Triscuit.

CROSS-EXAMINATION.

THE WITNESS: I am twenty years old. My experience in my father's store is my first experience in the grocery business. When we took the Kellogg's Whole Wheat Biscuit in our store, it was my first knowledge of that biscuit. I had known of Shredded Wheat before then. I had seen it before but I had not eaten it. I do not eat much very much. I do not really know whether we had it in the house or not. I had seen it before I went into the store. Customers in our store pick up packages of Shredded Wheat as well as the Kellogg biscuit, if they want them. They are both on the shelf. I think the sale of the two products is about fifty-fifty. The Shredded Wheat is one cent higher than the Kellogg's biscuit. We have advertised Shredded Wheat. There are quite a few articles in the Kellogg line, and we have advertised the Kellogg line. We do not carry other National Biscuit products, but just the Shredded Wheat. We carry another line of crackers. We do, from time to time, advertise Shredded Wheat and run specials on it. We advertise the Kellogg product as Whole Wheat Biscuit. We never say Shredded Wheat. We take no telephone orders. Our store is strictly a cash-and-carry self-service store.

RE-DIRECT EXAMINATION.

THE WITNESS: The last school I attended was the University of Southern California. I go there to night school now. I am able to say that the cellophane opening in the packages of Kellogg's Whole Wheat Biscuit is an attractive feature to customers in our store. The basis of my statement is that the customer can see just what is in the package. Then, it has more color than the other, as the customers tell me, and they seem to like it better because it fits the bowl. It is a smaller biscuit. One customer whom I know very well told me that, when she uses Shredded Wheat Biscuit, there is usually some left in the plate. When she buys these, there is no waste at all. They just eat it all up. We handle only the Shredded Wheat of the National Biscuit Company, not any of their other products. We buy the Shredded Wheat through a jobber. Dad usually gives the Kellogg order to a salesman who comes in. He sends them through, or Mr. Lee Thompson, the Kellogg salesman, brings them out. He takes orders for the whole Kellogg line, including the Kellogg biscuit. Those orders are filled through a jobber. No National Biscuit salesman calls on us. Dad goes down to the jobber and gives them the order for the National Shredded Wheat at the wholesale house.

RE-CROSS-EXAMINATION.

THE WITNESS: Mr. Thompson asked me whether I would come here and testify this morning. I said I would be glad to tell what I knew about how things stand in our store. I recognize Plaintiff's Exhibit 1 as a Shredded Wheat package, a package we have on our shelves. It has a picture of a biscuit on it. The customer can see the picture, and I imagine she knows pretty well what is in the package. The Kellogg package, Plaintiff's Exhibit No. 168, with the cellophane

window, shows the ends of the Kellogg biscuit. By looking in the package, the customer can see that that is apparently shredded wheat biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: I would not say that the Kellogg product is the same. If you take the two of them out, opening both, they do not look the same, at all. If I were asked to describe the kind of biscuit I see through the cellophane front, I would say it is a shredded whole wheat biscuit, of a much darker shade. It is toasted more, on both sides. I am not conscious of any bias or prejudices as between the National Biscuit Company and the Kellogg Company, in favor of either or against the other in any way at all. I have not colored my testimony a bit.

RE-CROSS-EXAMINATION.

THE WITNESS: What I see through that cellophane window is a shredded whole wheat biscuit. I would say it was more toasted than the other. It is a shredded whole wheat biscuit. If I wanted to tell somebody what was in that box, I would tell them it was a shredded whole wheat biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: As I said before, I do not recall ever eating a Shredded Wheat Biscuit, the National Biscuit, but I do recall having eaten the Kellogg biscuit. I liked them very much.

RUSSELL A. POWELL.

Deposition taken at Los Angeles, California, February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-four years of age, and I am purchasing agent and merchandise manager of the

Individual Owners' Stores. I am not conscious of any prejudice in favor of either the National Biscuit Company or the Kellogg Company as against the other that would color my testimony in any way in this case. I am here to testify at the invitation of Mr. Cliff Gardner, a Kellogg salesman. Before my present position, I was in the grocery trade with the Continental Stores, for whom I was a buyer, for four years prior to February 4th of this year. Before that I was also in the grocery business as supervisor for a group of stores in San Joaquin Valley, the Martha Washington Stores, twenty-seven stores, with headquarters in Fresno. Those were grocery stores. Two years prior to that, I occupied the buying position at the former Continental Stores. They were known by the name of Daley's, Incorporated. I have been connected with the grocery trade for approximately the past eleven years.

I am acquainted with a product known as Kellogg's Whole Wheat Biscuit. I have known of it since its origin by Kellogg, approximately four or five years ago. The biscuit is a shredded wheat biscuit made of the whole wheat.

A representative of the manufacturer brought the package to us and offered them. He came to me as a buyer. He offered them for sale as part of the Kellogg line of products. I had had previous experience with other Kellogg products. We did not buy any of the Kellogg's Whole Wheat Biscuit the first time it was offered to us, or until our stores had a demand for it. Then we put it in only in a small way. That demand has increased materially. We advertised Kellogg's Whole Wheat Biscuit to the public through newspapers. No demonstration of the Kellogg's products was used in our stores. At the present time I am talking about my previous connection with the Continental Stores, which were self-service stores. The original stores were seven, but they have practically passed out of the pic-

ture. At least 65 per cent. are now self-service stores. The process of change is still going on. Just as fast as we close a service store we open a self-service store. The customer takes a basket, proceeds to the articles she has in mind, or looks on the shelves and selects for herself something she sees that appeals to her. Kellogg's Whole Wheat Biscuit are, naturally, displayed in those stores in the cereal department. The National Shredded Wheat Biscuit was also used and displayed in those stores. The two products would not be put together, necessarily. The customer could roam at will. She did not have to proceed through an aisle.

Kellogg's Whole Wheat Biscuit was sampled to consumers. I received samples at my own home.

After I left the Continental Stores, I took up service as buyer with another concern. I have not continued to have any experience as buyer with Kellogg's Whole Wheat Biscuit. That has been a very short period of time. We have been transferring our association from an affiliation with Continental Stores to M. E. Newmark & Company, who are wholesale grocers in Los Angeles. At the present time we are dealing with Kellogg's Whole Wheat Biscuit only through the service of our members. It is being supplied us by M. E. Newmark & Company. I do not know whether any of our members are carrying Kellogg's Whole Wheat Biscuit.

There are approximately one hundred and thirty-five stores in the Continental chain. All those stores were carrying Kellogg's Whole Wheat Biscuit. I would think that the distribution of that product in this market is rather general. We serviced also the individual owners and approximately thirty-five stores that belong to the Fitzsimmons organization. I do not know of any other concern making Shredded Whole Wheat Biscuit except the National Biscuit Company and the Kellogg Company, at the present time. I know that

Triscuit has been on the market for a good number of years; but it has never been a seller with us and we have not carried it for three and a half years. My impression of it is that it is a whole wheat biscuit. I do not know. I have seen it and tasted it.

(A carton of Triscuit was received in evidence as "Defendant's Exhibit No. 16.")

The service stores in the Continental chain also carry Kellogg's Whole Wheat Biscuit and the National Whole Wheat Biscuit. To the best of my knowledge, there was no confusion in those stores between customers wanting one or the other of those biscuit. We have been very careful that none of our store managers substitute any article for something the customer asks for. If a customer asked for Kellogg's Whole Wheat Biscuit, that is what she would get, and if a customer asked for Kellogg's shredded wheat, she would get Kellogg's. Our sale would indicate that they did ask for Kellogg's shredded wheat. I have personally sold customers Kellogg's shredded wheat who have asked for Kellogg's shredded wheat, who have said, "I want Kellogg's shredded wheat." I gave them the Kellogg's Whole Wheat Biscuit.

From my experience of the Kellogg product, I am in a position to say that there is a genuine public demand for Kellogg's Whole Wheat Biscuit.

We have had cellophane-front packages like Plaintiff's Exhibit 168 in our stores. Just part of the cartons were that way, previous to this time. My present impression is that all are cellophane front. I purchase Kellogg's Whole Wheat Biscuit, in conjunction with other Kellogg's products, in earload lots, part of which lot is the Whole Wheat Biscuit. The order is given to Kellogg's local representative, who calls on me as buyer. I specify so much Corn Flakes, so much Pep, so much Bran, and so much Kellogg's Whole Wheat Biscuit; part of the line.

The name Kellogg on a new product like Whole Wheat Biscuit would naturally help to introduce that product to the trade and to the consumers, because of the well-known nature and the well-advertised nature of the Kellogg name.

CROSS-EXAMINATION.

THE WITNESS: We do not buy Shredded Wheat Biscuit. We do not carry them at all. They are delivered direct to the stores by the National Biscuit Company. For a year or two after the National took over Shredded Wheat, I purchased from them direct. Before then, I bought Shredded Wheat from the Shredded Wheat Company.

I have known Shredded Wheat ever since my introduction into the grocery business, about eleven years ago. I do not believe I knew about it before then. I have never been addicted to the use of cereals for breakfast. When I came into the grocery business, I knew of Shredded Wheat right away. It was a large seller and moved pretty freely. I do not know anything about the sales of it now. I have had experience with the retailing of Shredded Wheat, and the fact that we carried it in our stores and sell it, but the volume I know nothing about. I could give you no idea of the comparative sales of those two articles whatsoever, at this time.

The Kellogg biscuit, to all intents and purposes, to me, tastes the same and looks the same as Shredded Wheat Biscuit. It immediately occurred to me that that was a shredded wheat biscuit. They are similar in appearance, taste, texture; and so forth. I would say it would be a product like oats. There are Quaker Oats, and there is Newoat, and Albers Oats. Then there is National Biscuit Company's Shredded Wheat and Kellogg's shredded wheat. In other words, I am using the term Shredded Wheat as descriptive of the product,

not as a proprietary name or anything of that sort. It never occurred to me that it might be a proprietary name, although I have known for a great while that that meant Shredded Wheat.

In our retail stores, I have had experience with customers who came in and asked for Shredded Wheat. We would say, "We have Kellogg's Whole Wheat Biscuit, and we have Shredded Wheat by the National Biscuit Company." We do not always, necessarily, make that distinction. I do not know how the average store manager would do. If a customer asked for Shredded Wheat, I would get her a package of Kellogg's Whole Wheat Biscuit and a package of the National Biscuit Company's Shredded Wheat, and say, "Which do you prefer?" I would let her take her choice.

To my way of thinking, a customer who asks for just shredded wheat does not have definitely in mind the National product or any other particular thing; because, for example: Jello has put out a gelatine dessert for a great many years. To this day there are customers who come into our stores and say, "I want a package of strawberry Jello in the red carton." The red cartons are put out by Jell-Well, which is also a gelatin dessert. Jello is a trade name. Nevertheless, some customers have used it as a common noun in the way I have described it. We take it that that is illustrative of the way they speak of shredded wheat now.

The Continental Stores is a regular chain of retail grocery stores. They have no affiliations with other stores. The Vans Stores are affiliated with them, being also a retail chain. They are part of the organization, with merely a different name over the door. The license in the stores is Continental Stores. There are three Vick's Stores. They are not affiliated with the Continental, except that the Continental Stores supply them

with groceries on a cost-plus basis. They participate in the advantages of the buying powers of the Continental Stores. I am now in no way connected with the Continental Stores. I entirely severed my connection with them on the 4th of February. My present outfit is what may be called a voluntary chain, headed up by a personnel of four people, of which I am one. We have merely made a tie-up with a jobber; whereby he is to service our stores. We are not affiliated with him at all. We have our separate individuality. There are one hundred and fifteen stores in that group.

The Continental Stores handle the National Biscuit Company's products and serviced by the National Biscuit salesmen in the regular way. That includes the National Biscuit Company's Shredded Wheat. As a buyer, I had no connection with the National Biscuit Company's headquarters at all. Their salesmen called direct on the stores, and they took their orders for National Biscuit Company's Shredded Wheat, crackers, and cakes, and the complete line. Those orders were filled to the individual stores; but the filling was done through headquarters.

RE-DIRECT EXAMINATION.

THE WITNESS: I was formerly associated as buyer in the Continental organization. That was when I bought the Kellogg product from or through a Kellogg salesman. I bought the National products for a period of approximately two years. After that, the National salesmen did not call on me; but a Kellogg salesman did continue to call. The Continental Stores do not carry, I would say, the complete National line, but they have a great many of their products.

I am not positive whether the same National Biscuit Company's salesman handles the whole cracker line plus the Shredded Wheat, now; but they are both on the same invoices. My impression is that the sales-

man who goes to the trade to sell the National line also sells the Shredded Wheat. I do not know of any salesman who simply handles the National Shredded Wheat line. I do not touch the rest of the National cracker line.

From my experience of the grocery trade, it is my opinion that the cellophane front is a help in the demonstration and sales of the Kellogg product; also that demonstrations and sampling of Kellogg's Whole Wheat Biscuit are a help in the sales thereof. That has all been valuable in introducing the product to the public.

The self-service stores of the Continental chain are typical of similar stores of other lines, with other proprietors, throughout Southern California. I would say that the same process of shifting from service to self-service stores is taking place in other organizations besides the Continental. That type of self-service store originated in other sections before it came here. The Piggly Wiggly chain is self-service. They are very wide-flung, covering practically the entire United States. In those stores, the customer goes and picks out what she wants, pays for it, and takes it out. I know of other self-service stores locally in Southern California, but not national stores. I know there are other self-service chains throughout the country, but I am not familiar with their service.

WILLIAM E. SESSENDEN.

Depoaiton taken at Los Angeles, California, February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am fifty-nine years of age. I have a fleet of trucks operating between Los Angeles and different docks at the harbor, and I am also in the warehouse business. Mr. Gardner, of the Kellogg Company,

asked me to be here today. I know people with both the National Biscuit Company and the Kellogg Company, and I am not conscious of any prejudice or favoritism for one of those companies as against the other, that would color or bias my testimony in any way. I have no feeling one way or the other in the matter. I consume Kellogg's Whole Wheat Biscuit occasionally.

I think I have known it since it first came out on the Coast. I then tried it and tasted it as a consumer. I had been a consumer of Kellogg's different products over a period of years. I liked almost everything I ever tried that they put out. I tried this as a matter of experiment the first time. I am very fond of it. I had tried the Shredded Wheat that comes from Niagara Falls or Oakland, before then. The Niagara Falls product and the Kellogg product are very similar, with the exception that, to my mind, the Kellogg biscuit is better done and of a different size. I prefer it, because, to my sense, it was better done than the other, and the size was more convenient to put in a saucer. When I first took the whole wheat biscuit, it seemed to me to be a shredded whole wheat biscuit. I thought it was just the same kind of biscuit as the one I had known before, but I thought it was better done. I recognized the difference in size. I like the better done biscuit better than the lighter biscuit. I use the Kellogg product every day.

I get around among some retail stores, but not as many as I do wholesale places. I know that Kellogg's Whole Wheat Biscuit is generally stocked by the wholesalers in this section. I have seen many cartons of Kellogg's Whole Wheat Biscuit like Plaintiff's Exhibit 168 with the cellophane front, in both wholesale and retail stores. I have noticed the biscuit through the cellophane front. To me, the darker color of the biscuit is very plainly observable through the cellophane window.

CROSS-EXAMINATION.

THE WITNESS: I am not in the food or grocery business or anything like it. I conduct a general warehouse. I have done distributing of vast masses of food products. I distribute Kellogg's products. I receive them in carload lots from Battle Creek, warehouse them, and distribute them in a variety of ways. Sometimes we have what we call pool cars, a definite amount of which the salesman has sold in advance against a car arrival. We carry spot stock on the floor for the jobbers who may call for any of their requirements that they may have run out of. We make shipments to the different towns in the territory on the orders of the Kellogg Company's representative. The Kellogg Company carries a stock in our warehouse as a storage place. It draws on that and issues shipment orders to us against that stock. I am not concerned, in any way, with buying and selling stock. I am just a warehouseman. Before, we did the same thing for the other Shredded Wheat.

I knew the product known as Shredded Wheat for many years and handled hundreds of cars of it. I acted in the same capacity for the Shredded Wheat Company, and received cars from Oakland. None came from Niagara Falls. I acted as their distributor in this territory until the National Biscuit Company took it over, and a short time afterwards, until their sales method was changed. I have been in the warehouse business practically eleven years. Before that time I was similarly engaged. The warehouse business is really a branch of transportation, and all my life has been spent in transportation. I have known about Shredded Wheat for a great many years, and it has been handled in many carloads, in large quantities.

I have noticed advertising of Shredded Wheat in national magazines. It has advertised extensively in

magazines, newspapers, and by other means of advertising. I have used it in my home for many years up to the time I first used Kellogg's. I have never used any since, because I like Kellogg's better. Kellogg's biscuit came to my attention first from the fact that we had some in the warehouse. My curiosity was naturally aroused, and I experimented with it. Prior to that time, I presume I have personally bought Shredded Wheat from retail stores. We have had it at our home. It was served to me on the table from time to time on a dish, with cream and sometimes with fruit. I do not recall the little booklets the Shredded Wheat Company got out telling me how to use it or suggesting ways of using of it. Members of my family might have had them and I would not know. I am willing to say that that product, under the term Shredded Wheat, has been on the market for a great many years and was a very well-known product. When I see the Kellogg biscuit through the window in the package, the first word that comes into my mind would not be Shredded Wheat, because I know the two products. If asked to describe the product, I would say it is a whole wheat biscuit, or shredded whole wheat biscuit. I might explain, possibly, that I do not know. I have never gone into it from the scientific standpoint. It means to me that the whole wheat, all of the wheat is there. Maybe that is erroneous. I do not know; but that is a fact that I gather from the description. I understand there are certain parts of the wheat that are very nutritious and there are other parts that are not so good for one. I understand they are all there, and that the wheat has been through some process that makes it come out in the strings, or what some people call shreds, and that is why it is called shredded; a mechanical contrivance of some sort that they have, I suppose. I never gave any par-

ticular thought to whether they were really shreds or something else. That is the other fellow's job. Neither Mr. Clarke nor anyone else connected with the Kellogg Company explained to me what the case is about. I do not know what the matter in dispute between the two companies is. I know there is some trouble, otherwise there would not be witnesses brought here; I do not know what the nature of it is.

RE-DIRECT EXAMINATION.

THE WITNESS: I have seen in cafes quite frequently the individual whole wheat cartons, like the one shown to me. They are usually arranged on a shelf. The ones that I particularly have in mind are cafes with long counters. Back of the counter, is a shelf with different commodities. Those are usually stacked up in some ornate shape, right in front, in plain view of the customers.

RE-CROSS-EXAMINATION.

THE WITNESS: I have seen similar cartons of the National Biscuit Company too.

LEE W. THOMPSON.

Deposition taken at Los Angeles, California, February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am twenty-one years of age, and a salesman for the Kellogg Sales Company. I have been employed by them steadily for the last year, starting in February, 1932. I had worked also as an extra with Kellogg Company for about two and a half or three years before I was a salesman. My total experience in the grocery field has been since November, 1930.

The nature of my duties with the Kellogg Company is as a regular salesman on the force. My job is to create a demand for our products. There are several ways of doing so. Taking orders is one. Being sure that your grocer has the products properly displayed; seeing that your products are properly displayed; and, besides the grocer, we work on the consumer too; sampling; testimonial pages; forty-inch ads; store display and advertising form, good-will calls. All those methods of creating consumer demand and introducing new products to the trade have been used in connection with all the Kellogg products, including Kellogg's Whole Wheat Biscuit. Kellogg's Whole Wheat Biscuit has also been advertised on other cartons of the Kellogg Company.

On the package of Kellogg's Wheat Krumbles, Defendant's Exhibit 17, appear the word "Wheat Krumbles," and under that, "Whole Wheat, Shredded and Toasted."

The distribution of Kellogg's Whole Wheat Biscuit in my territory is around 98 per cent. There are no definite figures; but it is in the 90 per cents., closer to 98 than anything. I mean by that that ninety-eight out of a hundred stores in the territory carry Kellogg's Whole Wheat Biscuit regularly in stock. The predominant character of the stores in the territory is self-service. There are very few service stores. A self-service store is where the customer goes in and can pick up any product she wants, without asking a clerk or any other person. She has her choice of any product there.

Kellogg's Whole Wheat Biscuit is whole wheat, shredded and made into a biscuit. There is another general type of product like that on the market, with which that comes in competition: Shredded Wheat made by the National Biscuit Company. Physically

speaking, those two products are both shredded whole wheat biscuit. The two products appear in most of the stores. Practically all the stores have cereals in one section. Your cereals, including Shredded Wheat are all together. As a general rule, they will put Shredded Wheat and Whole Wheat Biscuit side by side. Some of them display them differently, according to space. We have used quite a lot of newspaper advertising in this territory to introduce Kellogg Whole Wheat Biscuit to consumers. We have what we call a forty-inch ad. We go into the town newspaper and give them forty inches, and let them help us out in tying up all the stores with advertising whole Wheat biscuit. The forty-inch ad is on whole wheat biscuit. What we use most as premiums are geographical charts. The geographical chart is a premium we are giving. It consists of round discs with the geographical information of the United States, the capital, the population, main river, population of the largest city, highest point, and so forth, of each state. That is given away with Kellogg's Whole Wheat Biscuit. The newspaper tie-up on the forty-inch ad is what we might term a Kellogg week on the Whole Wheat Biscuit. We take a town and give the newspaper the forty inches, getting the stores to tie in with our advertising, they advertising the whole wheat biscuit and the geographical chart as a premium, to get the stores to make a special display of the Kellogg's Whole Wheat Biscuit at the time it is being advertised in the forty-inch ad. It has the effect of increasing the publicity of the product, by displaying it in the stores and showing it at same time in the newspaper ads.

That type of advertising has been used generally through the towns in Southern California in relation to Kellogg's Whole Wheat Biscuit. Sampling has also been done in our territory, of Kellogg's Whole Wheat

Biscuit. We have one demonstrator who works on our whole line. If it happens to be that the store she is working in advertises whole wheat biscuit, she pushes that the most, because the store has it on their advertising. It is her job to sell as many as she can. She will open up a package of them and serve them. She tries to attract the attention of customers and serve the Kellogg's Whole Wheat Biscuit to them.

We have done quite a lot of advertising on whole wheat biscuit. We have about five pieces that we use here in Los Angeles or in Southern California on whole wheat biscuit. We have a poster ad pertaining to these geographical charts, with a picture of the chart and the whole wheat biscuit, carrying the name "Kellogg's" on it prominently. We had a large piece about two and half to three feet long with a great big dummy package, about a foot by a foot and a half, a whole wheat biscuit, set right down sideways in a great big dish. Displays like that have been used generally in the different stores throughout the territory. We have an advertising company that works quite a lot on it, and we do a lot of it ourselves. The advertising company is under contract to get them into the stores in the territory.

Defendant's Exhibit 18 is one of the wheel-of-knowledge charts that goes into the retail stores. Defendant's Exhibit No. 19 is one of the jumbo cartons of which I spoke. We have used other methods. We have one plan which we have worked out quite extensively recently: A combination deal of three packages which we give the grocer if he will advertise this way: He will list three of the Kellogg products, Corn Flakes, Pep, and Rice Krispies, at a certain price, with the package of Whole Wheat Biscuit free. That has been generally adopted by grocers through this territory. We arrange demonstrations on Saturdays and work

there ourselves. They pay for three of the packages and we give the Whole Wheat Biscuit free, being the fourth package in the combination. The combinations differ, depending on the store and what products they want to run. Our suggestions are usually Corn Flakes, Pep, Whole Wheat Biscuit, Rice Krispies and Wheat Krispies. Kellogg's Whole Wheat Biscuit is used as the free package of the combination because we have been working on Whole Wheat Biscuit to increase the consumer demand on them. We feel that we can push it in that manner, by bringing attention to it, giving one package of them free. That concentrates the attention on the free package rather than on the other three packages. The other packages of the combinations are usually older or more established packages.

Grocers also advertise Whole Wheat Biscuit quite regularly—not all of them, the advertising being paid for by the grocer himself. The copy is prepared by the grocer and he controls the advertising. The newspaper tear sheets I have handed you, Defendant's Exhibit No. 20, carry advertising of Kellogg's Whole Wheat Biscuit in this general territory.

Last September, to the best of my knowledge, we started putting cellophane windows in all the packages of Kellogg's Whole Wheat Biscuit. We have been doing that up until recently. We are now packing them twelve with and twelve without in a case of twenty-four. In the beginning, we had just one cellophane package in a case. For a while we put all of them cellophane, and now half-and-half. The reason for using the cellophane window is that it draws attention to the product itself. Our idea in putting the window in is to show the people exactly what they are getting, a product that is toasted on both sides. It shows the size and that it has a little bit finer shred than our competitive item. It is toasted on both sides and darker in color. The cellophane window has the effect of directing particu-

lar attention to the package itself, makes it more attractive, altogether, and shows the people exactly what they are getting. It is a new method of packing biscuit as far as I know.

These various methods of bringing to the attention of the public Kellogg's Whole Wheat Biscuit have created a consumer demand for that biscuit. In certain instances, we have gotten distribution in stores where it was not before. When I came around to call on them again, they had ordered them out in the meantime. They had used up what they had and ordered from their jobber. I do not know very much about the distribution of the product to restaurants and so forth. I know there is distribution of the Kellogg product among restaurants and I have seen it there. There is quite a bit of it in restaurants, in our individual package, two biscuits to the package, a carton like Plaintiff's Exhibit No. 169. In the large package of Kellogg's Whole Wheat Biscuit there is a half ounce more, and we have fifteen biscuit to the package, whereas there are twelve to the National Shredded Wheat package. The two products are sold at the same price per package to the consuming public generally.

CROSS-EXAMINATION.

THE WITNESS: I started working with the Kellogg Company in November, 1930, as an extra. In February, 1932, I started in regularly. My first business experience was clerking in several dry goods stores. I worked for J. C. Penny and for Montgomery Ward. My first experience in the food business was with the Kellogg Company, from 1930 to the present time. At present I work in the capacity of a regular salesman, having my own territory that I look after, and working under the district sales manager, a Mr. West. Mr. Gardner, who is a jobber salesman, an older man, gives

us what information we need here. Before I went with the Kellogg Company, I did not pay any particular attention to this particular line of business. I had no occasion to make more than casual observation of it.

Plaintiff's Exhibit 168, represents a package with a window in, which has been in use since the fall of 1932. Prior to that time, we had no packages with windows, that I know of, since 1930. I think the package I am familiar with, which we had immediately prior to Plaintiff's Exhibit 168 with the window in it, had two faces, two main panels like the reverse panel on Plaintiff's Exhibit 168, containing a picture of two biscuit in a dish. That was the Kellogg's Whole Wheat Biscuit package during my experience, until they introduced the window package.

I recognize Plaintiff's Exhibit 167. That is a package a little different from Plaintiff's Exhibit 168, a later package. There is a difference in the perspective of the biscuit in the dish. That was introduced recently. I would say it is the most recent package, having come out since the package, Plaintiff's Exhibit 168, with the window. Plaintiff's Exhibit 167 is also made with the cellophane window in it. There is one setting on the table by Mr. Clarke now. The two packages, one like Plaintiff's Exhibit 167, and another just like it except for the window are the packages now put up, twelve in a case. I do not think I know any package of Kellogg's Whole Wheat Biscuit that has come out more recently or that has any difference, either as to pictures or design or reading matter than this. I am not positive about the reading matter, but the general resemblance is the same.

Our Whole Wheat Biscuit competes with Shredded Wheat Biscuit. I have never had any instructions as to Whole Wheat Biscuit being designed to supply the same market as Shredded Wheat Biscuit. I cannot remember having had any instructions of any kind, writ-

ten or oral, from anyone of the Kellogg Company with respect to competition with Shredded Wheat Biscuit. Take it for what the material itself is worth, though. We have heard Shredded Wheat mentioned in our sales talk as a competing item. I understand that Whole Wheat Biscuit competes principally with Shredded Wheat. That is true. It is not true that Whole Wheat Biscuit is the youngest child in the Kellogg family of cereals. We have had two cereals since we put out Whole Wheat Biscuit: The Whole Wheat Flake and the Wheat Krispies. They have not been discontinued. We are still pushing both of them with the same vigor we are pushing Whole Wheat Biscuit. We have sampled both of them. They are included in some of these combination deals. One way to shove out a new package like Whole Wheat Biscuit or Wheat Krispies is to include them in a free deal of that sort. Our idea is to draw the attention to that one product, by means of selling to the consumer two or three of our well-known products that the consumer is in the habit of buying, and then this newer product or lesser-known product goes with it. In that way, it comes to the attention to the consumer, but not involuntarily. It is a free package if she wants it.

The older Kellogg products do not require quite the same kind of intensive attention that the newer ones do. The fact is true that some of our products need more attention than others. I would say that Corn Flakes, for example, and Pep, have, through years of intensive sales effort, acquired a good deal of momentum. They are well known. It is true that people ask for them and repeat, without a great deal of sales effort. So we really concentrate on Whole Wheat Biscuit and newer items of that sort, that are more highly competitive. We run into articles that compete with Pep as directly as Shredded Wheat competes with Whole Wheat Biscuit. For instance, Pep is a bran flake,

and it competes with Post's Bran Flakes. In the same way, I would say that Post Toasties compete with Corn Flakes. The list of Kellogg's products on the jumbo package here is not now a complete list of the Kellogg family. Wheat Krispies and Whole Wheat Flakes should be added to it.

Corn Flakes compete principally with Post Toasties. There are other brands of Corn Flakes; but I do not regard them as important competitors compared to Post Toasties. All-Bran is the whole bran in the form of a rough whole-bran flake. I suppose it is shredded when it is cooked, but it is really not a shred when it is in the package. It is cooked before it is packaged; it is not raw bran. It is cooked to some extent. It is in small pieces.

Pep is a regular bran flake, closely resembling the Post Bran Flakes. Wheat Krumbles are a whole wheat product marketed in the form of narrow strips, pre-cooked and ready to use. I do not know how it is made. I would not call it shredded. It is in small strips. I do not recall any item with which Wheat Krumbles compete right now. It is in a class by itself without any direct competitors. It is true that all dry cereals compete with one another, more or less. It is not introduced for the purpose of competing with some item, and I do not know of any item that particularly competes with it.

Rice Krispies are rice in a puffed form. It is not similar to what we know as Puffed Rice. It is not blown as much. I would not say there are any other direct competitors of it. It is kind of in a class all of its own in taste. They have rice flakes, and Puffed Rice is a well-known cereal. I think the Quaker people make it. I do not regard our Kaffee Hag as a cereal. That is one of the Kellogg products which has as its principal competitor Sanka Coffee. They are both prepared in a similar way by some chemical extraction of caf-

feine. Both are supposed to sell as non-caffeine coffee:

The campaign methods that I have described as being used to interest the public in our Whole Wheat Biscuit have been more or less successful. We have gotten quite a distribution in Los Angeles and Southern California. I would not say that, so far as we have succeeded in getting distribution for that product, it has altogether been at the expense of Shredded Wheat. I think we have created new users who have never used either product before. That is true to a great extent. For instance, when the Grape-Nut Flakes came on, they created new customers who had never used cereal before. Grape-Nut Flakes is a new product, made by the same people who make Grape-Nuts, which had a very wide distribution before Grape-Nut Flakes was made. I think that, to a certain extent, and perhaps to a very considerable extent, Kellogg's Whole Wheat Biscuit has supplanted Shredded Wheat with certain people. It has taken some of the market of Shredded Wheat, and it was obviously intended to do so. So far as price is concerned there is no great amount of competition. As far as I know, the dealer makes a little more on the Kellogg Biscuit than he does on Shredded Wheat. That is something you can never be sure of, because you do not know. I am really not interested in what they are buying competitive items for in order to sell mine at the same price. I guess it is natural for a competitor who comes on the market second to endeavor to get his price a little under that of the original man if he can. I never figured out whether the pound-for-pound price received by the National Biscuit Company is greater or less than that received by the Kellogg Company for its product. There is another way you can look at it. It is according to how and where you buy your Shredded Wheat. We have a fixed price and fixed terms of discount for cash or whatever it may be. In the long run,

it is my impression that the Kellogg price, in most instances, is lower than the Biscuit Company's price. I think there is no difference in the price between the Kellogg product and the Shredded Wheat product in most retail stores. What I meant before was that I do not pay much attention to what the grocer is buying it for from the jobber. I did not know a witness testified this morning that the Kellogg product was sold in his store for a cent less than Shredded Wheat. It may be so. It might be in a few stores. I said that, generally speaking, the prices are the same.

Looking at the *Los Angeles Evening Herald* for January 2d, page A-4, the Kellogg Company does not pay for that kind of advertising. We are instrumental in arranging for that set-up. We asked them to advertise our products. This is Ralph's Grocery Company. Those are dealer ads, not what I referred to as forty-inch ad space. While, in each of the three top advertisements, Kellogg's Whole Wheat Biscuit is advertised at nine cents a package, the usual average retail price is ten cents. The advertisement for nine cents and the one in the *Redding Eagle*, December 13, 1932, Kellogg's Whole Wheat Biscuit, three packages for twenty-five cents you find on specials sometimes.

Referring to the *Seattle Daily Times* for January 6th, special Kellogg deal: One Kellogg's Corn Flakes, one Kellogg's Pep, one Kellogg's All-Bran, one Kellogg's Whole Wheat Biscuit, all for thirty-eight cents; we get that up, and we encourage him. That is one of our combinations. There is another one that calls for two for twenty-three cents. Right next to it in the *Denver Post*, Whole Wheat Biscuit Kellogg's is advertised two packages for nineteen cents.

RE-DIRECT EXAMINATION.

THE WITNESS: Mr. Gardner of the Kellogg Company just calls on jobbers and very seldom has anything

to do with the retail trade. Referring to Plaintiff's Exhibits 167 and 168, I would say that the biscuit shown in the plates of those two exhibits differ in color. One is a trifle darker than the other, Plaintiff's Exhibit No. 167 being darker, the later package. In the sale of Kellogg's biscuit, the words *Whole Wheat* are emphasized in the package and in advertising as much as possible.

The Kellogg product is a shredded whole wheat biscuit. The other Kellogg products, as well as whole wheat biscuit, are advertised by retail dealers. The combination arrangement I have described, being a sale of three packages of Kellogg's with one package free, is regarded in the trade as in the nature of sampling, free sampling. We would not give away one of the packages of Whole Wheat Biscuit by itself. The other three packages have to be bought. If you buy three packages of cereals, you get one package as what you might consider a free sample. In that instance, the sample is a whole-sized package, a regular standard package of Whole Wheat Biscuit. All the products in the Kellogg line are pushed, and all of them are advertised. Most of them are sampled, except one or two. There are three or four other brands of Corn Flakes on the market, including Jersey Corn Flakes, White House, Red and White, Newmark—all toasted corn flakes.

(One package each of Kellogg's Corn Flakes, All-Bran, Pep, Wheat Krumbles, Rice Krispies, Koffee Hag, Toasted Wheat Flakes, and Wheat Krispies, and Whole Wheat Flakes were received in evidence and were marked "Defendant's Exhibits 21, 22, 23, 24, 25, 26, 27 and 29.")

When a retailer advertises, it is customary for him to advertise products at something a little below the average price. When I said we get up the combina-

tions, I do not mean the Kellogg Company prepares the advertisements, the reading matter, or the set-up of the retailer ads. We tell him we will give him the one package to give away free with three other packages. He writes the ad up himself. The Kellogg Company does not see the ad or have anything to do with it before it is published.

RE-CROSS-EXAMINATION.

THE WITNESS: The advertisements that make a little special price are sort of a bid to get the customers in and interest them in a bargain in the grocery. Then they buy some more things at the regular rate.

RE-DIRECT EXAMINATION.

THE WITNESS: I can say of my own knowledge grocers in this type of ad sometimes offer the National Shredded Wheat in their regular weekly ad at a shade below the average price for it.

RE-CROSS-EXAMINATION.

THE WITNESS: When I told Mr. Clarke that the Kellogg biscuit is a shredded whole wheat biscuit, I meant that, in my opinion, it was a descriptive name for the biscuit.

MISS MARIETTA CONDON.

Deposition taken at Los Angeles, California, February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: I live home with my brother-in-law and my sister. I do not know anyone connected with either the National Biscuit Company or the Kellogg Company of Battle Creek, Michigan. I am appearing here on the invitation of Mr. Nigg, who, I

Wink, is a representative of some kind of the Kellogg Company. He is just a friend of mine. I am not conscious of anything that would prejudice me for or against either company.

I am familiar with the product known as Kellogg's Whole Wheat Biscuit. I use that product as a consumer, and I have used it for about two years. I went to visit some friends. They were having them that afternoon, and I was asked to have one. I liked it very much, so I have been using it ever since. I would describe the biscuit as shredded wheat. I do not know what you would call it. I would just call it shredded wheat biscuit. I have never used any other shredded wheat biscuit but that biscuit. I buy them in a package, sometimes from the Sparton, where you go to the counter, and sometimes at the markets, like the Penny Market, and the Family Market, and the Safeway, where you just go around and buy. When I go to a service store, I go right in and say "I want a package of Kellogg's Shredded Biscuit," and the clerk gives me a package. I have never asked for it any other way than as Kellogg's Shredded Biscuit. One time I asked for Shredded Wheat, and they gave me some kind of a big biscuit like that. I told them I did not want it, that I wanted the Kellogg's shredded biscuit, because I liked it, because they are small, dainty, and I liked them better. In fact, I always use everything of Kellogg's, anyway.

CROSS-EXAMINATION.

THE WITNESS: I know about Shredded Wheat. I have heard a whole lot about it for many, many years. It is a well-known product. I have not eaten it. I have only used these biscuit and the bran. I am not using Shredded Wheat. That Shredded Wheat Biscuit is what I use. That is the biscuit made by the Kellogg Company. I do not know why I call them

Shredded Wheat. I guess it was because the lady said they were shredded wheat. I never even noticed it. I know they are called on the box, Kellogg's Whole Wheat Biscuit. I think that is right. That is what they are. There is the box I get all the time. It says, "Kellogg's Whole Wheat Biscuit." I did call it shredded wheat, Kellogg's Shredded Wheat Biscuit. I never saw Plaintiff's Exhibit No. 1 before. I do not think I recognize it. I see a picture of whole wheat. I recognize it as a Shredded Wheat biscuit. I would describe that as shredded wheat. I have never been a user of that product, and I do not think I ever bought it. I have bought the Kellogg package. That is what I referred to just now as Kellogg's Shredded Wheat. Kellogg's is what I use all the time. It is possible that what I looked at was the Kellogg's, the same kind. I am interested in the Kellogg name and I am a believer in Kellogg's products. I do not really know why I called the Kellogg biscuit shredded wheat. I have heard of Shredded Wheat. Probably it was because the Kellogg biscuit looks like the old shredded wheat biscuit that I immediately jumped to the description; but I do not know that I have ever tasted those. They are not Kellogg's, are they? I have never tasted this biscuit in Plaintiff's Exhibit 1, made by the National Biscuit Company formerly at Niagara Falls, but I have heard the word "shredded."

MISS GLADYS CHILDRESS.

Deposition taken at Los Angeles, California, February 10, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a demonstrator employed by the Kellogg Sales Company. I worked District No. 9, in the City of Los Angeles. I have worked in prac-

tically all the leading markets in the city, sometimes two or three different times. I have demonstrated the entire Kellogg line in those stores, including Kellogg's Whole Wheat Biscuit.

I always have a table. I cut the front out of the cereals, and I sample with a little bit of cream and strawberry preserves on them; on all the cereals with the exception of the Whole Wheat Biscuit. I have not been serving that so much, because I find it a little bit awkward to cut up and give a sample quickly. I have been serving the other cereals, and Kaffee Hag. The demonstration table is usually placed near the cereal section, if possible, so to have access to as many people as are interested in cereals. The purpose of the demonstration is to create new customers, make friends, and show the entire line to people who possibly were using part of the line and were not familiar with the All-Bran or Whole Wheat Biscuit.

In the various stores that I have visited in this district, I have found that they carried Kellogg's Whole Wheat Biscuit in stock.

LOUIS WILSON BROWN.

Deposition taken at Dallas, Texas, February 14,
1933.

DIRECT EXAMINATION.

THE WITNESS: I am buyer for the Handy-Andy self-service stores, a home-owned group of chain stores. Under our direct supervision, there are seventeen in the City of San Antonio. The other stores are under a franchise supervision. We have no control over them at all. We buy for the other stores, when they send in a request to purchase merchandise for them.

The seventeen stores under our supervision are self-service. The customer comes in, gets her basket, picks out the merchandise she wishes to purchase, comes to the check counter, and we check it out.

I know of a product known as Kellogg's Whole Wheat Biscuit, which is on sale in the Handy-Andy Stores. It is what you might call a shredded wheat biscuit. That is the only name I know of that you would call it. I know of another shredded wheat biscuit on the market besides Kellogg's, made, I believe, at Niagara Falls. I also handle that biscuit. The two kinds of biscuit are displayed together. In other words, say this is our cereal section. We have a display of only the one package in the front, mostly, on account of not having sufficient room. We will set one by the side of the other. That is the only way we display our merchandise. The customer picks off whichever package she wants.

We sell approximately three to one of the Kellogg's biscuit to the Niagara biscuit. Those are all sold by the customer picking the package up herself. We have no sales assistants whatever. The cellophane window package, Plaintiff's Exhibit No 161, is the one we have in the stores at this time. All the Kellogg's biscuit we now carry are packed in cellophane packages like Plaintiff's Exhibit 161, as far as I know. The Niagara Shredded Wheat is in packages like Plaintiff's Exhibit No. 1.

Our stores have been handling Kellogg's biscuit at least two or three years, or more; ever since they had the product on the market. I have not been a user of the National Shredded Wheat Biscuit. I have been a user of Kellogg's biscuit. I am a first customer, as far as shredded wheat is concerned, of the Kellogg biscuit. I never used shredded wheat until I was made a present of a package of Kellogg's Shredded Wheat, and I have used some since. We have advertised it,

and they have sampled it. That is the way we have built our business. The sampling has gone right to the home of the prospective consumers. I would estimate that about five cases per store per month of Kellogg's Whole Wheat Biscuit are sold to our stores. The average sale of the Niagara Falls biscuit would be about one-third of that, one and a half or two cases. Kellogg's is packed two dozen to a case and yours is packed three dozen. There have never been cases in any of our stores, to my knowledge, of customers bringing back to the store a Kellogg package which they had picked up, not wanted, and sent back. I do not see any similarity between the Kellogg package, Plaintiff's Exhibit 161, and Plaintiff's Exhibit No. 1, the Niagara Falls package. I do not think I would ever confuse one of those packages with the other in any way. I have never known of any instances of confusion of one package with the other in any of our stores. I would say that Plaintiff's Exhibit No. 161 is a more modern and up-to-date package. I think that fact would help in the sale of the Kellogg product in self-service stores. I know of no substantial change that has ever taken place in the appearance of the Niagara Falls package in the time I have been familiar with it, at least seven or eight years, anyway. I think that, in stores like ours, a modern up-to-date package would have a favorable effect on the sale of an article of food.

I cannot think of any other factors besides those to which I have referred that would help to introduce the Kellogg package to the favorable attention of consumers. I would think the name Kellogg would affect it favorably, because Kellogg's products have always been known as good merchandise among the consuming public. Modern buyers are very conservative, I would say, and not inclined to buy new products until they have at least sampled them or know something about the quality of the merchandise. After that, if

they like the new product, they will absolutely change over to it.

We buy Kellogg's Whole Wheat Biscuit through our local jobber. The Niagara Falls Shredded Wheat is serviced by the National Biscuit Company directly to the stores. The practice of advertising Kellogg's Whole Wheat Biscuit by our stores is a very common practice with us. It is common practice with other stores of the same general type as ours to advertise their product to the public. It is more of a cooperative plan between the owner of the store and the man who is selling the product. It is common practice in the grocery trade.

The National Biscuit Company now have a system right along with the cookies and crackers, the whole business, including Shredded Wheat, where they service our stores now. Before that, we bought our Shredded Wheat through our local jobbers. We now buy it through salesmen of the National Biscuit Company, off the truck. We handle other National Biscuit products besides the Shredded Wheat Biscuit, just a few items, not the whole line.

I know that Kellogg's Whole Wheat Biscuit has a distribution in San Antonio, in the biggest majority of the stores. I have never seen it in a restaurant, because I hardly ever go there. I suppose you could find it there.

I would call Uneeda Biscuit a soda cracker. I do not know any other descriptive name for shredded wheat, or shredded whole wheat biscuit as the name soda cracker is descriptive for Uneeda Biscuit. In my view, the Kellogg biscuit is a shredded wheat or a shredded wheat biscuit.

CROSS-EXAMINATION.

THE WITNESS: I am buyer for the Handy-Andy Stores, a local chain, all under one ownership, at a

central office. My duty is to buy for those chain-stores. I buy for other stores, franchise Handy-Andy Stores, not owned by us. They pay a royalty to us for the use of the name. They have the privilege of buying through us, to get their buying power. I have been buyer for those chains about three years. Before that time I was connected with the wholesale houses. The Handy-Andy Stores have a central buying office, where I am located and do all the buying. It is a pretty good-size chain, and takes up all my time. The advertising of Kellogg's Whole Wheat Biscuit is done in our regular weekly ads in newspapers of all specials that we put on sale to bring customers in the stores. We call it Kellogg's Whole Wheat Biscuit. I did not bring any ads with me. We have never referred to it as shredded wheat in any of our ads, that I know of. I told Mr. Clarke I would call it a shredded wheat biscuit. That is the only way I have been educated to call it. I suppose that is the only thing I could call it. I was so educated by its appearance. That is all I know. I have been educated to the fact that that is the only thing I knew to call it, just like anything else, like an automobile. If it is a Ford, or whatever it is; I call it an automobile. I called Kellogg's Whole Wheat Biscuit a shredded wheat biscuit, because it looked like the only shredded wheat biscuit I had ever seen before, because of the similarity of it. I could not describe it in any other way than just a shredded wheat biscuit. I base my statement on its appearance. I know it is made from wheat. I did not have it analyzed, but it would not be on the package if it were not. It is in shreds, as far as I can see. A shred is kind of a stringy shredded stuff, such as shredded coconut. You see shredded coconut in long shreds. I cannot give you a definition of shredded or shred. It is just strings, like shredded coconut. I never heard of shredded corn. I could not picture it.

I could not picture it torn into shreds. I could picture it in pieces; but shreds mean to shred an article into strips. I could not tell you how you could rip or tear a kernel of wheat apart and make a long shred. I have no idea. I cannot conceive of any way that it could be done; but it is there, that they show it to you. It is advertised as that by the Niagara Falls Shredded Wheat. They have a biscuit there that they call Shredded Wheat. I would not say that a trade name necessarily implies that it is the name of the ingredients from which the product is made. Shredded wheat as the trade name of the product in Plaintiff's Exhibit No. 1 is the only descriptive name I know of it. That is the only name I know of that particular kind of biscuit or that I knew until I saw the Kellogg biscuit on the market. I do not remember handling the product known as Triscuit. I do not think I have ever seen any product on the market, except Plaintiff's Exhibit 1 and Plaintiff's Exhibit 161, made either in that form or from long threads of wheat. I think it is good policy for the manufacturer of nationally distributed merchandise to change the appearance of his package. They do that quite generally.

I buy and sell Royal Baking Powder. I do not know how long it has been on the market. I do not know that I have ever seen it in any other package except the identical package in which it is distributed. It is hard to say whether that identical package for fifty years would be good merchandising or not. It seems sometimes as if it has more competition. I do not think that, if the Royal Baking Powder people materially changed the appearance of their package, it would hurt the sales of it a great deal. I think that people recognize, the instant they come into the store, the Royal Baking Powder package and that that is what they want.

I have bought and sold Armour's brand of soda. I have not seen any change in that package. Some of the standard brands that have been on the market as far back as I can remember have not changed their package.

We do not advertise shredded wheat biscuit like Plaintiff's Exhibit No. 1 in our ads. I suppose advertising has something to do with the sale of a product. The Kellogg Company does not pay for the advertising I do for Kellogg's Whole Wheat Biscuit or for any part of it. The Kellogg Company does not direct or place the ads. They solicit it. That is all. By that I mean that their representative comes around and asks us to place in our ad any certain item they may wish to get out. Sometimes they will sample it over the city and asks us to place it in our ad of specials. We do that at their request whenever we feel like it. They give no allowance to cover advertising, that I know of.

So far as I know, I have never been solicited to advertise shredded wheat like Plaintiff's Exhibit No. 1. On your special product, the consumer demand has not been great enough to justify me to advertise that; and the company seems not to co-operate with us nearly as much as the Kellogg Company does, in sampling the trade, or in soliciting our assistance in helping put their product over, and things like that. We never heard a word at all from the Niagara Shredded Wheat people. The Kellogg salesman would come around and tell us: "Mr. Brown, we have distributed so many thousand samples of Kellogg's Whole Wheat Biscuit over the city, and we would like to have you run it special in your ad this week," for a tie-up of the advertising campaign. I do not know of the Niagara Falls people ever doing anything such as that. We always do tie up with any manufacturer who get out

and does such things. That is the only relation I have with the Kellogg Company. They just come in and ask us to advertise. That is the only tie-up I have with them.

As buyer, I purchase such of the shredded wheat as I purchase direct from the National Biscuit Company and not through jobbers. I have not asked my jobbers for it lately. We did at one time. It was in the jobbers' hands at one time. For a while, we were unable to get it from the jobber. I could not tell you why he did not have it in stock. I do not know whether the jobber handles it or not now. I have not had occasion to find out, because I have a regular schedule from the National Biscuit Company.

RE-DIRECT EXAMINATION.

THE WITNESS: My attention being directed to "It's All In The Shreds", that refers, on Defendant's Exhibit No. 8, to the biscuit, as far as I can see, the little strings of which the biscuit is made. I do not remember seeing that phrase displayed on any other packages or any of the advertisements of the shredded wheat of the National Biscuit Company. The dealer advertising I think would help to move our stock of Kellogg goods and create a consumer demand for it. We wanted to tie up our advertising of the Kellogg product so that it would fit in with the sampling that the Kellogg Company distributed to the consumers. Such things as allowance for advertising are not told. If there is such a thing going on between us and some corporation, our trade in the stores do not know it. As far as I know, the Kellogg Company does not make any allowances for advertising. They have no supervision whatever over and do not dictate the form of the advertising or have any control whatever over the ad.

RE-CROSS-EXAMINATION.

THE WITNESS: We get no regular monthly or weekly allowance from the Kellogg Company to cover advertising matter, that I know of.

GEORGE F. BARTH.

Déposition taken at Dallas, Texas, February 14, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am superintendent of the Handy-Andy Stores, San Antonio. We are a chain food store with seventeen units. They are exclusively self-service stores. When a customer comes in our store she goes by the basket rack and gets a basket. The stores are so arranged that she goes through the vegetable department first, then the meats, then the groceries. As she brings in her basket, they check off the bills and she pays going out. Everything she picks up she picks up herself, without the assistance of any clerk. We have a manager and checker in each store. They are usually on the checking stand or else arranging stock on the shelves. About 15 per cent. of all the stores in San Antonio are self-service stores. Practically all the other stores tend to shift over to the self-service basis.

I certainly know of a product called Kellogg's Whole Wheat Biscuit. I believe I have known it ever since they first started to make it. I have always been in the grocery business. I was up in Michigan where they are made. I do not know how many years ago that is. The Handy-Andy Stores carry Kellogg's Whole Wheat Biscuit regularly in stock. I have been with them a little more than a year, and they have had them about since I have been with them. They also

carry in stock the Niagara shredded wheat. Kellogg's biscuit will outsell the Niagara Shredded Wheat by a big margin. I do not know how much. Offhand, I would say probably three or four Kellogg packages to one of the Niagara, all of which are sold by the self-service method I have described. Each one is as well displayed as the other. The customer makes her choice in all cases. Based on my experience in the Handy-Andy Stores, undoubtedly there is a genuine consumer demand for Kellogg's Whole Wheat Biscuit in those stores. The consumer demand has been created, I would say, by the advertising methods of Kellogg's, the way they have gone after it, demonstrating it, the much more modern and attractive package, I believe, is what put it over. The name Kellogg would have an influence on it. I believe it would help put any product over, on account of the quality of their merchandise in all their packages. The Kellogg package is much more modern than Plaintiff's Exhibit 1. In fact, I think that is the biggest feature of it. I refer to Plaintiff's Exhibit 161, the package with a cellophane window in it. I could not give you the exact figures on the average number of cases of Kellogg sold in our stores in a month's time. That would be within the province of Mr. Brown, the buyer. I would describe the Kellogg biscuit as a shredded wheat biscuit. I do not believe any other name comes to my mind, any other descriptive phrase. It is made out of wheat, I believe, and the wheat is shredded. Shredded wheat biscuit would be the only thing I would think of.

CROSS-EXAMINATION.

THE WITNESS: I am superintendent of the stores, seventeen of them, in San Antonio. I have heard before of the biscuit like those in Plaintiff's Exhibit 1, called Niagara shredded wheat, because I used to sell it before Kellogg's put theirs on the market, and they

always called them Niagara shredded wheat. I have gone through their factory so many times, and people up North called it that. I have been through the Niagara Falls factory several times. I have called it Niagara Falls shredded wheat ever since I have been able to walk, I guess. It is called shredded wheat more than it is called Niagara shredded wheat, I guess. That is the name I have always known it by. When I was up there, the Niagara Falls factory had a sign on it: The Home of Shredded Wheat.

I do not remember any changes in the Niagara Shredded Wheat package. I believe the picture of the biscuit on the front is new, but I do not recall definitely. I remember the picture of the factory and of Niagara Falls on the end as long as I remember the package.

Looking at Plaintiff's Exhibit 161, the Kellogg package, as I look through the cellophane window and see what is inside, I could not think of any other thing to call them by than shredded wheat. I cannot see any difference between them as I look at them through that window than the shredded wheat biscuit I have always known. The Kellogg advertising of this product has been very active ever since I have been down here, a little more than a year. My knowledge of this territory is only about a year. Before that, I was in the same line of work in Michigan. The advertising with which I am familiar in places took the form of a great deal of sampling and house-to-house work. I believe they have also given one package free with the purchase of one package. We have done a lot of window advertising, window displays, but no demonstrators in our stores. We have carried both kinds of Shredded Wheat, and they are featured about the same on our shelves. They are near together. A customer can wander all over the store wherever she pleases. She has one way in and one way to get out, however. We

have all our cereals segregated in one place in the store. We have no specific place for either Kellogg's Whole Wheat Biscuit or shredded wheat, except on the cereal shelf. That would be entirely up to the manager. We classify the cereals; so Kellogg's Whole Wheat Biscuit and shredded wheat might be side by side. Our stores do not necessarily push Kellogg's products.

Kellogg's Whole Wheat Biscuit sells three or four to one of shredded wheat, without any particular effort on our part. I believe that is because the Kellogg has a better means of advertising their products than the shredded wheat. At least, they do it more, and I think they do it better. They get to the point. I do not recall Kellogg doing anything else in San Antonio than I have already mentioned. We have a few display materials, such as we put in our window. We have had some copies of the Wheel of Knowledge stuck on to some of the packages. I believe Plaintiff's Exhibit 161, with the window, is the exclusive package we use in San Antonio at present. I do not believe we have any packages without windows. I believe I have seen them without the window and with both panels like the rear panel of Plaintiff's Exhibit No. 161.

I recall the package, Plaintiff's Exhibit 10. I could not honestly say that I remember seeing the dish with biscuit in it on the package. I usually associate that Niagara package with the picture of the factory on the side. I do not remember seeing the plate on one end. I do recall seeing it in shredded wheat advertising.

I have known the Kellogg biscuit ever since it has been on the market. I do not remember how long. There was a different shaped package at one time. I remember packages like Plaintiff's Exhibit 166. That is the time they called it Shredded Whole Wheat Biscuit. I do remember that. I was up in Michigan at that time, in Saginaw. I was not with the Kellogg Com-

pany, but I was in business for myself. I carried the Kellogg products, and I carried shredded wheat. They were handled through the Shredded Wheat Company at that time. The Kelloggs had not been doing very much advertising at that time, so the Shredded Wheat had the edge on them at that time. It was a big seller at that time, and it did sell easily.

RE-DIRECT EXAMINATION.

THE WITNESS: There is a difference in the size of the Kellogg biscuit, as compared with Niagara Falls shredded wheat. I believe there are fifteen of Kellogg's and twelve to the Niagara. I believe there is a half ounce difference, if I remember right. The Niagara is the largest individual biscuit. I believe Kellogg's have a half ounce more to the package. The fifteen Kellogg biscuit weigh half an ounce more than the twelve shredded wheat. The methods we have referred: Dealer advertising, manufacturer advertising, store displays, the modern Kellogg package, the cellophane window, are methods that all manufacturers use. I have never seen any yet that have not used the same methods. The Kellogg Company has used them in pushing its whole wheat biscuit and in creating a demand for it. I do not recall a customer bringing the Kellogg biscuit back for any reason at all.

RE-CROSS-EXAMINATION.

THE WITNESS: I am supervisor of the stores, but I do not know about prices. I just look after the stock. I do not examine the changes in prices. I cannot tell what any of the prices are in any of my stores on these two items.

GEORGE W. CREIGHTON.

Deposition taken at Dallas, Texas, February 14, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-six, a buyer for Sidney Myers, Inc., wholesale grocers, who have a working agreement with Weingarten, Inc. They also have a cash-and-carry soliciting trade from all independent retail grocers in Houston and surrounding territory. Weingarten has large super-stores, cash-and-carry retail. There are eleven of them, all located in Houston.

I know a product called Kellogg's Whole Wheat Biscuit, and have known of it approximately a year and a half. It is carried regularly by Sidney Myers and serviced by them to Weingarten and other retailers. It is in considerable demand at present among our retail distributors. There has been a large increase in demand within the last six months, which I would say is traceable to missionary work done by Kellogg, canvassing from house to house, and sampling; thus creating a consumer demand. I would say the product is stocked in every principal and chain store in Houston.

I would describe Kellogg's Whole Wheat Biscuit by saying it is a shredded wheat biscuit. In the last ninety days, we have handled the Niagara shredded wheat. Before that, we could not buy it, because they did not sell to the wholesale grocers. We tried to buy it, and they refused to let us stock it. Their own representative came down and solicited our business, asked us to stock it. I buy both items. I generally buy about ten cases of Niagara shredded wheat a month. I would say we sell, under ordinary circumstances, fifty cases of Kellogg's Whole Wheat Biscuit a month. In the past sixty or ninety days, they have put on several specials or sales in Whole Wheat Biscuit. Our purchases of that one item alone have run between three hundred and fifty to four hundred cases, moving out in our cash?

and-carry trade, where the retail grocer comes to our warehouse. We have four salesmen lined up at a table. The customers walk in and we sell them anything we can. Ordinarily, the salesmen are nothing but order takers. They write down what the customer wants. They pay us for them there and take it right out in their own cars.

I have never noticed a retail customer get one product and want the other. They will invariably say whether they want Niagara or Kellogg's Whole Wheat Biscuit. I have never had any retail customers return one product saying they got the wrong package. They take their own merchandise away. We deliver nothing. It is strictly cash-and-carry wholesale grocers.

We are not the exclusive distributors of Niagara shredded wheat to our general contact trade. All the National Biscuit Company trucks in Houston contact not only all chain stores, but also every independent retail store. They have their shredded wheat right in their truck ready to deliver, right out in front of the retailer's door right now. So I would say strictly we are in competition with the National Biscuit Company as a wholesaler of Niagara Falls shredded wheat; because we do not contact the retailer until he walks in our front door. Ten to one the National Biscuit Company route truck has already been to his front door before he has had breakfast. Shredded Wheat is the only National Biscuit item we stock.

The Weingarten concern operate self-service stores. They carry both makes of shredded wheat, Niagara and Kellogg's. They are both on display in the Weingarten stores. The customers serve themselves and take whichever they want.

CROSS-EXAMINATION.

THE WITNESS: Sidney Myers is a large grocery house. The original set-up was in business about five

years. I have been with them almost two years. Before, I was in Shreveport. We just do a cash-and-carry business. Any retail customer may come there and take away all the groceries he wants of any description. They are also connected with Weingarten, a group of stock-owned retail stores. We are their principal source of supply. The principal stockholders in Weingarten Stores and in Sidney Myers are probably the same. You could say that Weingarten constitutes a retail outlet for us, or that we are a source of supply for Weingarten. There is a community of interest there.

Weingarten stores have always stocked National Biscuit shredded wheat, but they have been supplied direct by the company, along with its cracker line, and that is still done that way. I would not say that Sidney Myers had no shredded wheat at all since I have been with them up to ninety days ago. They had it, but it was bought from Weingarten, not from the National Biscuit Company.

In my prior experience, I have purchased shredded wheat from jobbers in Shreveport. I have known shredded wheat all my life. I do not think I ever heard it called Niagara shredded wheat until the Kellogg Company came on the market with their Whole Wheat Biscuit. It was always called shredded wheat and always came in a package similar to Plaintiff's Exhibit 1. Up to the present, Sidney Myers actually stocks shredded wheat in our house. I do not know about actual handling of purchasers, because I am not in the sales department. If you came to that table and said, "I want a case of shredded wheat," and we did not happen to have it in stock, we possibly could take the order for it and have it delivered direct by National; but I do not know that it has ever been done.

The Kellogg Company in the last six months have been doing house-to-house sampling and had a deal,

whereby, for instance, a Weingarten store would purchase from Sidney Myers twenty cases Whole Wheat Biscuit. Then a representative of Kellogg would buy eight of the twenty, which they would take out and sell to the consumers, with the understanding they would receive one package free with the purchase of one. There has been newspaper advertising of the product, I think only as Kellogg's Whole Wheat Biscuit, not as Kellogg's shredded wheat. We publish catalogs and advertise the product as Kellogg's Whole Wheat Biscuit. We also list shredded wheat. The eight cases I used in my illustration, which Kellogg buys back, are purchased from the Weingarten store at the regular retail price. We actually sell them to the Weingarten concern at our regular price, which gives us a profit. They receive from the Kellogg salesman the regular retail price they sell them at for general distribution. About two hundred cases have been handled that way through Sidney Myers, in the last sixty days. When I speak of the proportion of ten cases National shredded wheat to forty or fifty Kellogg's Whole Wheat, I did not mean to say that was the proportion of Weingarten sales. The only outlet Sidney Myers has for National shredded wheat would be through the independent retail trade we serve in our cash-and-carry department, because Weingarten is supplied direct by National. That would also be aside from what the independents could buy from the National Biscuit Company trucks.

I never attempted to buy shredded wheat from National and failed, because, when I went there more than a year ago, I was instructed I could not buy it from National. About ninety days ago, their representative called on us, solicited our business, and said we could buy it. We immediately stocked it. I do not remember the man, though I met him.

The biscuit in Kellogg's package, Plaintiff's Exhibit 161, looks through the window like shredded

wheat. Personally, I think the window package is a factor in the sale of that biscuit. The sight of it through that window has some sales appeal, I think. It looks like shredded wheat, which makes it an easier seller. It looks like shredded wheat. I think it is a shredded wheat. As I said, I can describe it no better than by calling it shredded wheat. It could be sold to a customer who asked for shredded wheat, and he would think he was getting shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: I would say he was getting shredded wheat. Referring to Plaintiff's Exhibit 161 and Plaintiff's Exhibit 1, I would say that the Kellogg's Whole Wheat Biscuit package was more modern in get up than the other. I would say the cellophane window was the most striking thing on it, being a comparatively new feature in food packages. I have never before seen that used on any Shredded Wheat Biscuit package. I think it would influence the sales of the product to the consumer. It would immediately tell them exactly by sight what they were going to get.

The Weingarten chain advertises directly to the public in the newspapers. They have advertised Kellogg's Whole Wheat Biscuit so. I would say we hope advertising of that kind would tend to create consumer demand for the Kellogg product, or we would not advertise it. When we do that, we always have a special price on them. Naturally, we expect to draw considerable trade on those items.

Sidney Myers handles the rest of the Kellogg line, which is a well-known line in the grocery trade. If the National Biscuit Company ever did any sampling like that I have described of Kellogg purchasing back their products from the retailer, I never have heard of it. It is a very common method of sampling. It is not new or something invented by the Kellogg Company.

RE-CROSS-EXAMINATION.

THE WITNESS: I have known shredded wheat all my life, and I have known it in the package Plaintiff's Exhibit 1 or a package similar thereto. There are many packages on the market today, old packages, which have retained the same or similar general appearance for a great many years. Royal Baking Powder is a very well-known package. Personally, I do not think the same appearance of a package for a great many years, so the public becomes familiar with it, attaches a strong value to the package. I think a person accustomed to a certain form or color of package readily takes to a brand new form of package. It is possible that good will attaches itself to a package known for many years, if it was able to maintain the volume of business it always had. The adoption of modern packaging methods to one method of advertising and the clinging to old, tried, well-known packages are both relied upon by some manufacturers as good merchandising. I would not say one was wholly bad or the other wholly good.

RE-DIRECT EXAMINATION.

THE WITNESS: A good many manufacturers have recently modernized their packages. For instance, General Foods modernized their Jell-O package recently. Standard Brands have just modernized their Royal Gelatine package. I do not know their theory. My reaction is that they are desirous of keeping up with the times, want the package more attractive, to have more sales appeal on the shelf, especially in this country where we have so many cash-and-carry stores. A customer comes in and nobody will say a word, unless she wishes to locate an item and asks the clerk. If a package appeals to her, even if she does not know what it is, I believe she would be naturally attracted to it.

That is what I mean when I say the cellophane window in Kellogg's package is an attractive feature.

In this section of the country, the self-service type of store is become more popular, as I notice in the ten years I have been here. The shift has been away from regular service stores to self-service.

RE-CROSS-EXAMINATION

THE WITNESS: There are still some service stores left, and they fill a very good demand on the part of the public. Kellogg modernized the product as well as the package. The color scheme on the new package of Jell-O is different, but not entirely. Red predominates on both packages, and yellow. The Royal Gelatine package used to be a dull red. Now, every flavor has its distinctive color.

On the sampling and buying from us, another concern that does something similar is the Rumford Baking Powder Company, which is worked a little different. I buy it at list price less regular discount. On Kellogg's biscuit, we have our cash-and-carry price, which we put out to all independent grocers. Kellogg's salesmen will come in and buy at my selling price. They do not get them from the retailer, because the retailer would want his profit on it, too. General Foods do that with their products. So does Standard Brands. Their salesman may come in and get it at our cash-and-carry prices and take it out and work the retail trade.

RE-DIRECT EXAMINATION.

THE WITNESS: Referring to the opposite side from the cellophane window, on Plaintiff's Exhibit 161, and Plaintiff's Exhibit 1, I do not notice a whole lot of difference in the general color of the biscuit shown on the Kellogg package and the biscuit on the Niagara Falls package. I would say that the biscuit on Plaintiff's Exhibit 148 is a great deal lighter than the biscuit on Plaintiff's Exhibit 161.

CHARLES F. FLORIAN.

Deposition taken at Dallas, Texas, February 14,
1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-one; manager of Weingarten Grocery Company, number 11 store, 3600 North Main Street, Houston. I have charge of that store, which we claim is a complete food market. It is a nice sized store. I think it is as large as any store in Houston. It is considered one of the largest. It is a self-service store. In the grocery department, a customer gets her basket and goes around and shops. In the other departments, they wait on her. In the grocery department, she pays for what she has when she checks out. She has to come in at a certain gate. After she is inside, she can go all over the store as she pleases, without being routed any particular way. I know a product named Kellogg's Whole Wheat Biscuit. It is a biscuit formed in a case. You have a glassine window you look through and see the biscuit. It is a shredded wheat biscuit. My store carries it. We also have the shredded wheat biscuit of the National Biscuit Company. We have handled the Kellogg product for some time. Those two products are displayed on our self-service shelves, just stacked on the shelf, no preference at all that I know of. It is just as easy for a customer to pick up one as the other.

We have had a very big demand for Kellogg's Whole Wheat Biscuit in our store in the last three or four weeks. We had a great sale on the biscuit. They had a campaign from house to house, and that seemed to cause some demand for it.

Referring to Plaintiff's Exhibits 161 and 1, I do not believe I would say either one was more novel in its get-up; except that, in Plaintiff's Exhibit 161, you can see the biscuit through the glass. I think that has

been a common feature in food packages recently, within a year or so that they put that out. I would think that window would have favorable effect on the sales of the product displayed through it.

Weingarten Stores advertise through newspapers and ads to the public the products carried by them. I do not think they have had Kellogg's biscuit in their ads, as far as I can remember. I have not seen any such ads to remember them. They advertise so many items I do not remember just what. We never had any customer bring either product back and say they had gotten them mixed up and wanted the other. We do not generally come in contact with them. They just help themselves. We very seldom wait on anybody. If a customer came back and brought something, saying she had made a mistake and wanted something else, I would know about it. I never heard of any cases of that sort, either with National Biscuit Shredded Wheat or Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: I have been with Weingarten Stores eleven years, nearly all my business life. I worked before in Rosenberg, Texas, with the Rabinowitz Fair. I knew shredded wheat before I was in Houston. I did not eat it as a boy. I do not eat much of any kind of cereal. I suppose the stores I have been in carried shredded wheat in the old days. I know it was made before Kellogg's Whole Wheat Biscuit, and I have known that about a year. The big increase of sales in Kellogg's Biscuit during the last three or four weeks came very suddenly, due to the intensive selling, sampling, and advertising campaign of Kellogg. Prior to that time we were selling both products in our store. People come in and pick up Shredded Wheat like Plaintiff's Exhibit 1. We get eleven cents on

shredded wheat and ten cents on Whole Wheat. When Kellogg was sampling, I know they sold their package for ten cents and gave one free. They said they were sampling, and there was some kind of deal on. I imagine it is quite possible a customer wanting shredded wheat might pick up the Kellogg package, take it home, and say nothing about it. I suppose one looking at Plaintiff's Exhibit 161 would readily think that was shredded wheat in there.

RE-DIRECT EXAMINATION.

THE WITNESS: I think I am familiar with the rest of the Kellogg line, Corn Flakes, and the general Kellogg family of products. The predominant colors of Kellogg's food cartons are like that, the carton with green trimming and red letters. I do not think that fact would have any influence whatever in attracting consumer favor to a package put out by Kellogg.

We have had dried fruits in cellophane bags. I think cellophane increases the sale of products about five hundred per cent. That is true with regard to prunes, apricots, and candies. The latter increased so much that they are putting everything in cellophane bags. The first week we had it changed over, we doubled the sale on orders. I think the cellophane, as used in Kellogg's Whole Wheat Biscuit package really increased the sale of the package. The National shredded wheat is usually eleven cents in our store. They had a special on it one time for ten cents a package.

I do not know what the price was of the Kellogg package sold to the consumer with one package free. All I know is they had a campaign on and they said they were going to distribute some Whole Wheat Biscuit. At that time, I noticed an increase in consumer demand for Kellogg's biscuit. Whether it was the

price or what I really could not say. Whole Wheat Biscuit in our store outsells shredded wheat about two to one.

RE-CROSS-EXAMINATION.

THE WITNESS: It has outsold it here in the last eight or nine months, which I think may be due to the intensive advertising they have given it. I do not know why I think Plaintiff's Exhibit 161 is so good a package. They probably see the merchandise and know what it is. People like to see what they are buying. They see the ends of these biscuit in the package, it looks like shredded wheat, and they take it. I do not know whether they buy it for that. I suppose they buy it because they can see what it is. It does look like shredded wheat. I carry other National Biscuit products, crackers and cookies. The National has some cellophane packages, too. They have the round cellophane packages. I do not carry them in bulk varieties with cellophane on the package. I carry only in the package that a customer can pick up readily. There are a lot of cellophane packages in the biscuit line. A customer can pick it up and see what is in it. That is what they want to see, regardless of whole wheat or what it is. They want to look in your packages. I put a display there of candy with old type glassine bag. They take it and tear this out to see if it is the same as in the cellophane bag.

ROBERT H. PERLITZ.

Deposition taken at Dallas, Texas, February 14,
1933.

DIRECT EXAMINATION.

THE WITNESS: I am an assistant buyer with the Schumacher Grocery Company, Houston, wholesale grocers. They have been in the wholesale grocery job-

bing business for fifty years. Just recently, because of present conditions, we took on a voluntary chain, the I. G. A., and are supervising the operation of about two hundred and fifty stores throughout the south Texas territory. We handle the I. G. A. stores and act as a supply depot for them; and, along with that, our other wholesale grocery business regularly.

We have jobber salesmen. For the I. G. A. we call them supervisors. They are not required to buy merchandise from us, but we give them all their sales help. Naturally, that kind of business comes to us. We sent them supervisors not to solicit their business for us, but to help them produce business. That in turn produces business for us. The same men also act as salesmen to the other retail merchants not in the voluntary chain.

Some of our orders come through the supervisors; others in writing or by telephone. A majority are taken by the supervisors, written out and filled from invoices. We also have a cash-and-carry department. The merchant or dealer helps himself to wholesale quantities in less than unit packages, less than cases, purchasing at will from those packages. It is a self-service wholesale.

I have heard of a product known as Kellogg's Whole Wheat Biscuit. I am familiar with Plaintiff's Exhibit 161, and have been as long as I have been in the grocery business, and as long as that package has been on the market for sale. We handle that package throughout our entire territory. We do not handle the National or Niagara shredded wheat at all, throughout our entire unit and have not for some time.

Our main offices are in Houston. We have branches located in ten other districts throughout Texas, extending from the southeast border to the southwest

border, the Rio Grande, or the Valley, at Beaumont, Austin, Cameron, LeGrange, Eagle Lake, Victoria, Corpus Christi, McAllen, Texas. Each one of these branches works as a distinct separate unit, so far as its merchandise is concerned. The salesmen or supervisors work out of that branch and sell and deliver out of it. We may stock that branch from our main warehouse in Houston; but the deliveries to the surrounding territories come directly from the branches.

Our office has not gotten orders for the old or National Niagara Falls shredded wheat recently or lately. Ever since the National changed its policy of distribution direct, we discontinued their line throughout our entire system. Perhaps once after the account was discontinued, some retailers may have thought we still had shredded wheat. If they did and specified that particular article, we no longer listed it in our cost book or carried it in stock. We would refer them to the National Biscuit Company, tell them they had their own trucks and would deliver from their store. Since then we have handled nothing but Kellogg's Whole Wheat Biscuit. Thereafter, they would specify Whole Wheat Biscuit. I have never encountered any confusion between the National shredded wheat biscuit and Kellogg's Whole Wheat, to my knowledge.

We never had any packages returned to us, for the simple reason we go out, take orders, write them on our invoices. The man in the territory taking the order writes it on the invoice as it is to be filled and shipped, specifying the quantity and the item. He specifies the Kellogg product as Kellogg's. There is a demand for it from our voluntary chain outlets, which we can gauge because they are regular. We get their accounts week in and week out. Some of the others may go to another place where they can get it cheaper

one week. We gauge that through our I. G. A. concern, which trade we handle exclusively. Our business on that item has shown an increase as time went on. There is a very good weekly demand for Kellogg's Whole Wheat Biscuit, which was created in the first place by extensive sales work of the Kellogg people on their products in our territory, which I know of; first, by advertising through newspapers direct to consumers; then, various sales helps to our sales force; then, sampling direct to the housewife, also by impressing upon the retailer the fineness of the product, and by sampling occasionally in the retail stores. Those are the most thorough methods, though they may be costly. Kellogg has used them extensively down in our territory. We have noticed a great increase by Kellogg in our business on all his general line of products.

CROSS-EXAMINATION.

THE WITNESS: The I. G. A. is Independent Grocers' Alliance, an organization just about nation-wide. They have headquarters in Chicago, operated by Mr. Frank Grimes, the originator of the idea. He selects his distributing points. Providing the wholesale grocery jobber is in harmony and he thinks it can be done, they get together and work out the territory. There is only one I. G. A. supplier in a territory. It all comes from Mr. Grimes' headquarters in Chicago. The chain stores are all independent grocery stores, each man running his own business. They get sales help from the alliance and in return practically give their business to whoever is at the head of it. That is part of the scheme, and to have mutual self-help between jobber and retailer. It enables the retailer to get some of the advantages of a chain member, although it is not strictly a chain store. As far as I know, all two hundred and fifty stores handle shredded wheat.

So far as I know, they get it from the National Biscuit Company. They are at liberty to buy from whom-ever they see fit.

I know and have known for some time the product in Plaintiff's Exhibit 1. We carried it in stock regularly up to the time they changed their manner of distribution. We enjoyed fairly good business on it, taking into consideration the other cereals. Our supervisors have to be very careful to specify Whole Wheat Biscuit in writing up orders. They have to specify it as it is for us to ship it correctly. If a supervisor got careless and asked for Kellogg's shredded wheat, they would ship Kellogg's Whole Wheat Biscuit. They would have not doubt as to what was meant, because they think Kellogg's is a shredded wheat biscuit. They have known it and been made familiar with it by Kellogg's methods. We have gained some very wonderful distribution on Kellogg's products in Texas. They have given us a real run on Whole Wheat Biscuit, as well as their other products.

I do not remember references in advertising to Kellogg's shredded wheat. Our voluntary chain stores have weekly advertised specials each Saturday. We have an advertising man who draws those up. Kellogg's is featured in those advertisements occasionally. The Kellogg agent does not help get that up. It is done strictly independently in our business.

I am assistant buyer in the main headquarters of our concern at Houston. It is just a family affair. I have been in and out of the business all my life. My father is with me. He is vice-president of the firm. My whole business career has been with that firm. I have been with them approximately three years, actively engaged, day after day. I am out among the retailers once or twice a week. I go out and see what they are doing. I probably have seen shredded wheat

in some stores, at a glance. I do not necessarily go to determine what they have in stock. I cannot say I have noticed how the two items are priced in retail stores. Our company suggests retail prices. I am not well enough acquainted with the retail prices to say what they suggest on Kellogg's biscuit.

There is no fluctuation in the price of Whole Wheat Biscuit; but, just as a retailer changes his price from Saturday to Saturday, a wholesale grocer will put out specials: sugar, one week, and something else another; not on Kellogg's Whole Wheat Biscuit. That is standard. We carry it right along at that price. I cannot say I have had a customer come in and ask for shredded wheat nowadays. They knew they can get it from the National. If they asked for it I would refer them to the National. We do not do any business with the National at all.

I came up here today at the suggestion of Mr. Wilde, one of the agents of Kellogg in Houston. I came here alone. Kellogg Company have not definitely promised to reimburse me for my traveling expenses.

RE-DIRECT EXAMINATION.

THE WITNESS: If our stores construct a new building, we have a set shape and form for the building. If not, we try to make them as similar as possible by painting on the outside and arranging aisles and shelves in the interior. Not all are self-service. I guess 60 per cent. of them are strictly self-service. The shift to self-service is going on quite rapidly. That type store is very much on the increase. I said Kellogg has been pushing Whole Wheat Biscuit for three months. I did not say less or more. Ever since they have moved into this territory they have been very active in pushing their goods, for the last three years, as long as I personally can determine. In our

territory I think they are gaining more distribution on Kellogg's Whole Wheat than on National shredded wheat. Kellogg has the largest sales, through distribution.

BARTON V. ANDERSON.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty and reside at 5823 Marquita Street, Dallas. I am a salesman for the Kellogg Company, with headquarters in Dallas, Texas. We have in our territory Dallas, seven counties surrounding, and San Antonio. As such salesman I have to do with the product known as Kellogg's Whole Wheat Biscuit. My duties are to hold the distribution of that product and to further promote the demand for it. The methods used are given to me by Kellogg sales organization in Battle Creek, Michigan, on different campaigns, sales promotion plans, and samplings. We have had house-to-house coverage on samples. They have used newspaper copy and a few store sales in combination with other Kellogg products, demonstrations. There has also been dealer advertising of our biscuit in this territory, newspaper copy by the dealer. In the San Antonio market, I would say the distribution of Kellogg's Whole Wheat Biscuit is 85 per cent. I cannot say as to Dallas, but I would think as heavy as San Antonio, or better.

There is consumer demand for Kellogg's Whole Wheat Biscuit in this territory. The predominant type of retail store here in which Kellogg's biscuit is distributed to the consuming public is cash and carry.

The features of the Kellogg package of biscuit which, to my knowledge, have had sales effect in pro-

moting it are: The name: Kellogg's, the form of the package, and the coloring of the package. The quality of the merchandise, when once used, would justify buying the product again, because he liked it and continued to eat it. There are more servings per package, and the biscuit is crispier. The arrangement of the package itself with the cellophane window has helped us, also. It is new to the consumer. I think the cellophane window has a favorable effect upon the sale of the product.

I have very little to do with restaurant or hotel trade. Kellogg's biscuit has distribution, I know, in hotels and restaurants in this territory. It is distributed to them mostly in individual cartons. That trade is serviced by our jobbers and by Mr. Baskett, our man who does work in the hotels and restaurants.

CROSS-EXAMINATION.

THE WITNESS: I have been with the Kellogg Company about three years and nine months, in Dallas and San Antonio. I have to do with all Kellogg cereal products, including Whole Wheat Biscuit. I meant to include the whole line, as far as my duties are concerned. We have created a demand for the Kellogg Whole Wheat Biscuit among consumers. There has been considerable effort on that item, and on all other Kellogg products in proportion. I would not think the Whole Wheat Biscuit competes with the National Biscuit shredded wheat in any substantial way. It is a product owned by the Kellogg Company and known as Kellogg's Whole Wheat Biscuit. The form is the same and it sells, I would say, in competition with it. The statement was not made to me in connection with my instructions from Battle Creek nor have I heard it made that the Whole Wheat Biscuit is to compete with shredded wheat. It is a competitive product, naturally. It was never stated to me that it was to

be used as a competitive item against shredded wheat. I was to create a demand, a new market for it. Or the word "new" was not used. It was to create a market for the Whole Wheat Biscuit.

I have personally used shredded wheat, and I was at one time a demonstrator and had four additional demonstrators for the Shredded Wheat Company, about six years ago, in Texas and Louisiana. I was engaged at that time in introducing shredded wheat. I found it was possible to create a demand for it at that time, just as I found it was possible to create a demand for Kellogg's Whole Wheat, with the same general class of trade.

I have had charge of house-to-house sampling of Kellogg's Whole Wheat Biscuit; and I followed the plan talked about here today, purchasing supplies from some dealer; selling a package to the housewife, not necessarily for ten cents, but at a price and giving her one package free. The only time I did that for Kellogg's was in San Antonio for about two and a half weeks. Others have done it for the Kellogg Company here, to my knowledge. I and my associates have conducted the same kind of campaign with other Kellogg products. I believe we had corn flakes in the Valley. I believe that is the only instance I can recall of that product and Kellogg's Whole Wheat Biscuit that I featured that way. It is not fair to say, however, that the sales efforts made by samplings within the last year or so on Kellogg products have been largely concentrated on Whole Wheat Biscuit. We sample other products; but there is no other product we have handled in that same way, as long as I have been with the Kellogg Company. I do not think having had that one product, Whole Wheat Biscuit, for house-to-house sales might be called concentration on that one item. I think they were pushing all their other items just as

hard as they were that, although they did not adopt that particular method for any other item.

RE-DIRECT EXAMINATION.

THE WITNESS: I severed my connection with the National Biscuit Company August 1, 1929, I believe, through the change by the purchase of Shredded Wheat Company. I was retained on the sales force for some months after they took over. I believe they bought it the latter part of January. I left them the last day of July. I was discharged, as also were other shredded wheat salesmen. My position with the Shredded Wheat Company at that time was division sales manager. Whether the duties I had been performing were continued or not, I do not know. The responsibility for sales was transferred to the National Biscuit men of this territory. The old shredded wheat organization was completely dissolved, and the selling methods of distributing were changed. The sales of shredded wheat since, as far as they have been promoted by the National Biscuit Company, have been promoted by their cracker salesmen and those handling the cracker line, also others placed as responsible for that sale of that product. I had no connection of any kind, directly or indirectly, with the Kellogg Company, prior to my discharge by National. The period between my discharge and Kellogg employment was something like fifteen days. I was hired by Kellogg the day after I left National. No others discharged by National at that time were taken over by Kellogg. My duties were such as have been described here today.

I know of the use of the Wheel of Knowledge in connection with the sale of Whole Wheat Biscuit in this territory. There was a chart with each two packages of biscuit. It was bound to the two packages with twine. I do not think the sales effort of Kellogg for Whole Wheat Biscuit has been greater in the last three

months than before. I have known of no time since I have been with them when they have not tried to push its sale.

RE-CROSS-EXAMINATION.

THE WITNESS: About six years ago I was engaged in demonstrating shredded wheat. Then I became district sales manager of Shredded Wheat Company and was there about a year, when the National Biscuit Company took it over, changed its method of distribution, and I and my sales force went out. There was nothing personal in my discharge by National; just part of their policy.

When I first came with Kellogg, their Whole Wheat Biscuit was called Kellogg's Shredded Whole Wheat Biscuit. I do not remember I was engaged in any particular sales campaign on it when I first went with them. For the past two and a half to three years I have been with them, they worked the biscuit along with the other Kellogg products, in the same way. I have not done any house-to-house work on it until recently. I had charge of men who did house-to-house work in the field. I had to take charge of the group who did that work, and was actually on the ground with them part of the time. The salesman approached the housewife with Kellogg's Whole Wheat Biscuit in his arm. He would show her the package, tell her it was Kellogg's Whole Wheat Biscuit, and offer her one package for the price at which we bought it from the retail store, and a package of our own merchandise free. Our instructions, or my instructions to my men were not to bring up Shredded Wheat on those occasions.

When I told Mr. Clarke the advantages of the Kellogg biscuit: smaller biscuit, fifteen to the package, more biscuit to the package, my comparison was between those two packages setting on the table: Kel-

logg's and National. We brought out the good features of our product to the housewife. If she brought up shredded wheat, the salesman would naturally show her the advantages of our product. We would compare it with shredded wheat and say it was toasted top and bottom and there are more biscuit to the package. It is not true that a comparison of that sort almost invariably results in a sale. I do not say that I think this product shown to the housewife is a brand new product, not comparable to anything else she knows. The bringing up of the subject of shredded wheat is in a minority of cases. It occasionally occurs, and then we point out the superiority of the Kellogg product. We tell the housewife it is Kellogg's Whole Wheat Biscuit. Possibly one of the salesmen may have told her it is a Shredded Wheat Biscuit. I would not say that was not done. I do not hear everything the salesmen say. I call it Kellogg's Whole Wheat Biscuit. If I were asked to describe it further, I would call it Kellogg's shredded wheat. It says on the package: shredded wheat, and on the other end: Shredded wheat in its most delicious form. So the housewife does get the idea it is shredded wheat biscuit. It is a shredded wheat biscuit. There are so many customers one finds who do not know shredded wheat or have never eaten it. In going from house to house, we do not find many who have never heard of it; at least, we gained the impression when we talked with them that most people have heard of shredded wheat. As a food, it has been pretty much of a household word for a great many years. It is quite natural that, when a reference is made to shredded wheat, Kellogg's Whole Wheat Biscuit is called Whole Wheat Biscuit or shredded wheat, purchased under that name frequently. It is not so in every instance. People do call for Whole Wheat Biscuit. The customer would go in and get the product and not have to ask for it. Usually, in the cash and carry business, she picks out what she wants.

There are still some service stores left in this part of the country. It is quite natural for her to come to a store or by telephone ask for Kellogg's Shredded Wheat. If she has been sold on this product, she would ask for Kellogg's Whole Wheat Biscuit. I know she would ask for Kellogg's shredded wheat, and she would get our Whole Wheat Biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: Packages like Plaintiff's Exhibit 168, with the following on the top: "How you can obtain the Kellogg's Story Books of Games. Send this package top, together with ten cents in coin, to Kellogg Company of Battle Creek, Michigan, and we will mail you one of the new Story Books of Games. The entire series of four Story Books of Games may be secured for four package tops and thirty cents in coin," have been distributed in my territory.

I did my first house-to-house work for Kellogg in this territory on Whole Wheat Biscuit along the first of November, 1932. Before, we would have the two-and-one combination, about two and a half years ago, house to house, including Kellogg's Whole Wheat Biscuit, two packages sold and one free.

RE-CROSS-EXAMINATION.

THE WITNESS: The Kellogg Company or grocers at its instigation have not, in my territory, offered a combination of two or three different Kellogg products, together with a free package of Whole Wheat Biscuit. I know I have not used any of it. I have used other Kellogg products, but I have not used the Whole Wheat Biscuit as a free package.

RE-DIRECT EXAMINATION.

THE WITNESS: Not as yet. There is no policy against using it, whatever. We are to use whatever product we want to. Mr. Wilde tells us what product we can use.

ADOLPH H. WILDE.

Deposition taken at Dallas, Texas, February 15,
1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-six, and sales manager for Kellogg in Texas, having been such for about two and a half years. For more than a year, I was in Oklahoma City in the same capacity. I have been connected with the Kellogg Company twelve years. My territory is the entire State of Texas, except El Paso, Texarkana, and a few surrounding counties, about twelve marginal counties which are covered by other districts. El Paso is covered by the Denver District, and Texarkana is in the Memphis district. I direct sales for the Kellogg Company, carrying out the policies laid down by Battle Creek. It has been part of my duties to promote the sale of the product known as Kellogg's Whole Wheat Biscuit in my district.

We have used the usual methods we apply to any other new product that might come out, as well rounded a campaign as we can devise, with the exception of sampling. We have not sampled Kellogg's Whole Wheat Biscuit as much or as thoroughly as we might do in the case of some other newer products we have introduced in my time with the Company. We have sampled by selling two full-sized packages and giving one package free, because we wanted to put the whole package in the hands of the housewife. We have had a newspaper advertising campaign, with thorough coverage of our entire district, and our usual methods of obtaining tie-ups with the dealers. We explain to them what we are doing. When the campaign starts, we usually run a large ad and a series of smaller ads. Before the larger ads appear, we suggest to dealers that they tie in with the larger ad on their regular weekly advertising. We also solicit dealer tie-up advertising when we

do house-to-house work, which started some two and a half years ago in this State. We were using originally one free with two sold. We changed that in Texas last November, when we started using one free with one purchased. The dealer tie-up means that he mentions our product in his weekly ads, newspaper or circular. The larger outlets usually carry both. The wider their distribution, the better response we have to the tie-up.

Kellogg's Whole Wheat Biscuit is distributed in Texas largely through jobbers. Some of the large nation-wide chains, such as A. & P. and Western States, are served on a direct basis. We have the old-line jobber, who has been of great assistance to us since the change in National Biscuit Company policy on the marketing of shredded wheat. We did not feel they should continue to carry the National Biscuit product because it was being offered to their customers direct in competition to their own sales forces. We were good enough salesmen to point out to them the foolishness of having a sales force and it was necessary to fight a national distributor of any product, shredded wheat or any other, shredded wheat being the one we were naturally attacking. We were very successful in obtaining quite a few exclusive jobbers, especially the larger outlets, such as Radford, Wooten, Walker Smith, and Waples Platter, all large outlets in Texas, with a number of branch houses.

I regard those arguments to the jobbers for pushing the Kellogg line, where there was competition, as perfectly legitimate. It was a policy announced by the National Biscuit Company, in a letter openly announcing their policy of going to the trade, which put them in competition with jobbers and with the old-line jobbers, practically all of whom had salesmen traveling from place to place. In pursuing these methods of pushing our Whole Wheat Biscuit, we had the benefit

of those salesmen who traveled around or through the rural districts. It had a very material effect on our biscuit business.

Gradually, the demand created largely by our own efforts increased. The larger independent outlets in major markets, such as A. & P., the last to persist in not handling our product, finally stocked it. As our distribution increased through increased consumer demand, our sales increased by leaps and bounds.

We use two types of campaigns. In the territories where we do not have good distribution, we first have to get it to a certain point before we can really cash in on the better-known forms of advertising. Beginning last November, we went into markets where we did have a good distribution with more aggressive methods, with very good results so far.

We have also used the offer of The Kellogg's Store Book of Games you referred to on the top of the package, approximately twelve months ago. One of those booklets was given free with two packages, in Texas, in addition to those offered on the package top. We used the Wheel of Knowledge with two packages. I understand on the Coast they gave it with one package. That was up to the district manager at Battle Creek. We held our cost down. We figured our package sale would increase by giving one book with two packages rather than one.

The offering of those devices had the effect of bringing the product to the attention of new customers of the Kellogg Company, because we told the public about the Wheel of Knowledge, which we used, also, on the rest of the Kellogg line.

We have used in Texas demonstration methods of bringing Whole Wheat Biscuit to the attention of new consumers, meaning by demonstrations the store sales conducted by our salesmen. If we sell our jobber a large quantity of biscuit and it does not move out as

readily as we thought it would, we often have our salesmen use this as a free package on his Saturday store demonstration sale. We sold three of Kellogg's other products and gave this free with them. That could be any product we were overloaded with in any particular market.

Those methods have been used in this territory on Whole Wheat Biscuit since the first of the year. They are rather scattered; I do not believe we have had more than ten such sales in Texas, using Whole Wheat Biscuit as the free package.

About eighteen months ago, we began experimenting with cellophane. We felt reasonably sure the public was becoming cellophane-conscious. They bought very readily in stores products displayed in cellophane bags. They began marketing beans, prunes, dried fruits of various kinds with small slits extending around the package. We felt the public bought that thinking the product was in cellophane. That was the whole idea, as I see it. We began using our cellophane-window package for display purposes at first, only. It was expensive. We found evident ready acceptance by the public of that package. I believe, personally, the Whole Wheat Biscuit package is the most outstanding cereal package on the merchant's shelf today. The cellophane front has been of great assistance to us in Texas.

I think the easy-opener method as on Plaintiff's Exhibit 161, the feature of a weakened dividing line around the top of the package to be pushed in with the thumb, opening the package easily, which was advertised on two-thirds of our products in Texas, has been of big assistance in selling. I think I have covered the ground pretty thoroughly on devices in connection with the Kellogg package, except that it has the same family scheme as all the rest of our products; and the name

Kellogg's, of course, is no detriment to new consumers trying the goods.

If we are to judge by the introduction of our other new products, especially in Texas where the cash-and-carry store is predominant, we very often have floor displays of our new product with just the name Kellogg's. Long before we sample them or tell them about it by radio or in newspapers, the housewife is picking up that product. Even in the hard times of the last two years, there is a ready acceptance of new products. We are pretty happy with sales increases we have been able to show the last two years on Whole Wheat Biscuit. The various campaign methods and package features very decidedly create a demand for the product. Self-service stores and voluntary chains have assisted us. The demand in those stores has increased steadily. By the use of more aggressive methods adopted last November, we fully expect to continue that increase.

The Atlantic & Pacific Tea Company is a large organization in our territory. They are the controlling factor in the retail business for the City of Dallas. They do the largest volume of business here. They cover practically all central and eastern Texas and extend out as far as the Texas upland, about two hundred and fifty miles. We find they want to know what is going to be done to create consumer demand on a product before stocking it, especially on new products. We found them especially hard to sell Kellogg's Whole Wheat Biscuit to. Ever since they have been in Texas, I have been trying to sell them, about three and a half to four years. We could not sell them. The Dallas unit finally stocked it, the entire stores services from the Dallas branch, about two hundred and fifty stores. They extend way up into Oklahoma. They stocked it last June, and they have carried it since. The Houston unit stocked it early in January, 1933, and seemed very much satisfied with it as they have repeated. With the

Whole Wheat Biscuit, the A. & P. wanted to know what we were doing, wanted us to quote figures of what others were doing with our biscuit. They were largely swayed by figures we quoted them as to what other retail outlets were doing. The A. & P. are both service and self-service. My opinion is that the greater percentage of their business is cash-and-carry, although they have clerks if customers desire to be waited on. The customers wait on themselves. That is the predominant type of store in the major markets in our territory. I would say that type of store is increasing. Large sums of money have been spent promoting the self-service idea in Texas.

I would say that, in San Antonio, the percentage of distribution of Kellogg's Whole Wheat Biscuit is about eighty-five per cent. coverage of the entire retail stores; about seventy-five per cent. at Houston, and about seventy per cent. at Dallas, seventy at Fort Worth. Those proportions are increasing in those respective markets. We could very materially increase them by going after that. The outlets stocking our biscuit in Dallas control ninety-five per cent. of the total business, so we are not worrying about widening our distribution at this time. We would be willing to advise Battle Creek to appropriate more money toward a sale or any kind of campaign, radio, newspaper, or sampling from house to house, to sell more Whole Wheat Biscuit. It is necessary to have a certain number of outlets, before your advertising is effective. Your money would be largely wasted advertising a product which did not enjoy distribution. In Texas we would not hesitate to turn loose with anything we would do anywhere. The distribution in the stores would affect the advertising behind the product; but we have now reached the point where we would advise Battle Creek to give us anything they desire, and we would receive the full effect of their advertising. Even if radio ad-

vertising were used, we would receive its full effect, because they could go to this or that store and buy it.

We have a fair distribution of individuals in Texas. The consumer demand, however, is away ahead of our cafe business. We feel we should increase our restaurant business materially this year by going after it more aggressively, working the cafes a little more regularly. The National Biscuit policy of direct contact with their trade makes it difficult to reach the cafes as we would like to. The National's representatives see especially, the larger cafes oftener than we are able to do with our present sales set-up. Nevertheless, we are making nice inroads in the biscuit business in Texas; we are making progress in cafes. We find a larger number of cafes enjoying a very good business on our product. We are in direct competition, in our territory, with the National, as far as Shredded Whole Wheat Biscuit is concerned. We are both selling like products.

Co-operate advertising is used by a lot of manufacturers, but it has not been used by the Kellogg Company. By that I mean special outlets are selected by the manufacturer and are paid to feature a given product, mention it in the regular weekly advertising they run, either in newspapers or circulars, and display it prominently in the stores. That is against our national policy and is not done with any other Kellogg product. Aside from that, we have used all the standard, established and best-known methods of introducing the products, as far as I know.

CROSS-EXAMINATION.

THE WITNESS: I would not say that Kellogg's Whole Wheat Biscuit is designed to compete with shredded wheat biscuit. We are in the cereal business, and that field presented to us an opportunity to increase our general business, and to help our entire line

by the addition of shredded wheat biscuit. It is not like shredded wheat biscuit. I think we have a better product. As far as the general physical description of it goes, it is whole wheat biscuit, made in long filaments like shredded wheat biscuit. It varies in the processes that make it a decidedly different product. I differ from what you want me to say here, that it fills the same wants, for this reason: I maintain we have increased materially the consumption of shredded wheat by having entered the market ourselves. I think we have a better product and that our intensive methods have opened new outlets. There is no question in my mind that, in doing so, we are competing with shredded wheat. Except that all cereals compete with each other more or less, there is no other product the Whole Wheat Biscuit competes with. We offer ourselves competition by the aggressive methods we are using to put the biscuit over in Texas. We are possibly not increasing total cereal consumption as much as we are increasing the sale of Whole Wheat Biscuit. I would say we are affecting shredded wheat very materially by using the tactics we are using in getting it before the public. If they like our biscuit better than the other, our business grows. Our business has grown, and we now enjoy a very satisfactory business on Whole Wheat Biscuit in Texas territory. I would not say that is quite largely at the expense of shredded wheat. I would say it affects shredded wheat more than it does any other cereal. We have no doubt a lot of present consumers who have been past consumers of shredded wheat, by the introduction of our business methods.

It was necessary to sample our product. In approximately fifteen towns in Texas last year, we sampled with a full-sized package of corn flakes, house to house. That was Kellogg's Corn Flakes, not a new product; an established product, we were trying to

increase the sales of. Wheat Crispies was something new. We sampled them in the small-sized packages. We started them that way. That is the way I started Kellogg's Whole Wheat Biscuit in San Antonio, when I was then a salesman. I sampled those. In our recent campaign we used only the large-sized package.

Texas is predominant in this way: For instance, Post Toasties, a corn flake, outsells Kellogg's Corn Flakes. In the twelve years I have been with Kellogg, we have made progress in tearing down the established business on that product. We have thrown thousands of small-sized samples in Texas. A careful supervision and check-up shows we have increased the sales of Post Toasties while distributing our own samples approximately 15 per cent. That would have been true if we had sampled our small-size Whole Wheat Biscuit. We would have increased the sales of shredded wheat, instead of tearing it down.

The Kellogg Company encourages the ladies in their organizations to have demonstrations of the Kellogg product. I could explain that plan in detail to you, but we have an expert over here who does nothing else but that. Those things are sometimes featured in the newspapers as a semi-social event. We interest the housewife in the promotion of things of that sort, as to the sale of our entire line. Brownwood is in our territory. There was an event such as is referred to in the clipping, Plaintiff's Exhibit 180, from the *Brownwood Bulletin*. The newspaper offered that as a co-operative donation to us. That necessarily is a news item, done as that. In addition, he enjoys a large number of our schedules on various other products, and he gives us the support of reading matter co-operation. He gets it up himself. I would think that was about the middle of last year, September or October. They call it Shredded Wheat Biscuit in this article.

They are not our copy writers. Our friends of the press write it. Persons outside of our organization often refer to it as Kellogg's shredded wheat biscuit. They do not do it often in dealer advertising. That has been broken down by the National Biscuit people, who have used, we will say, questionable methods in warning them against the use of "shredded wheat biscuit." I would not be surprised if told you had a great number of tear sheets from all parts of the country in which Kellogg's shredded wheat is featured; but you cannot find many from Texas, because you evidently had an aggressive bunch of fellows here, right on their jobs. I do not know whether you would say they threatened our customers with dire consequences, but they discontinued calling it shredded wheat. One of our best customers in the state discontinued very suddenly. I do not think you could have got by with very much of a threat with him, but you did scare him. You did not get the customer away from me, but you did succeed in having him stop calling it shredded wheat, which we were perfectly willing he should do; because we try to establish our product as a Whole Wheat Biscuit and are having fair success in doing so.

I remember the old Kellogg package, Plaintiff's Exhibit 166, called Shredded Whole Wheat Biscuit for about three or four years. It must have been at least four years ago. I have heard rumors, but I do not know for sure why *shredded* was dropped at that time. I know it was dropped in 1930, and it became Kellogg's Whole Wheat Biscuit. I do not remember packages resembling Plaintiff's Exhibit 174, with picture of a dish and Kellogg's Whole Wheat Biscuit on both panels, coming down to Texas. The first package coming to Texas had a bowl on one side, very definitely. I do not remember a package with a "bowl" on both

sides. I do not recall what it had on the other side. My recollection is hazy about that.

Plaintiff's Exhibit 165 was a later package than Plaintiff's Exhibit 166 and is substantially the shape and size of the present package, although it is still called Kellogg's Shredded Whole Wheat Biscuit. When these packages were put out, no such intensive or aggressive efforts were made to introduce it as we have made in the last two years.

I do not remember Plaintiff's Exhibit 174 being in Texas at all. The single panel is the only one I remember; but I do not recall what was on the back panel. Whole Wheat Biscuit on the other side; but what else I do not recall.

Plaintiff's Exhibit 168 with the cellophane window started the early part of last year; but we did not offer it for sale generally until about four months ago. It came sometimes two to a case for display purposes, and was marked not to be sold, for display purposes only. After 1930, our packages were marked Kellogg's Whole Wheat Biscuit and we endeavored to sell it as Whole Wheat Biscuit, avoiding calling it shredded wheat biscuit. Our educational efforts on the public have been devoted to making them conscious of the name Whole Wheat Biscuit. We have been working toward our present point, where I feel perfectly at liberty to tell Battle Creek we can use any method of advertising this product they desire to use, and have a full and proper distribution.

Looking at Plaintiff's Exhibit 1, a newer package than Plaintiff's Exhibit 168, and different, designation: A shredded wheat product, on one end, and Shredded Wheat in its most delicious form, is not, I think, now, helping us in our endeavor to make the public conscious of the name Whole Wheat Biscuit. It does not assist much in that way. I think we have an established business in Whole Wheat Biscuit.

Today, we find a growing percentage of the retail grocers who refer to it as *biscuit*, and that is gradually extending to the consumers. I do not think the consuming public refer to it as shredded wheat nearly so much as we experienced when we started our own more aggressive methods of advertising to get it over to the public. People know that Kellogg is making shredded wheat. They do not call it shredded wheat. I can feel safe in saying that even telephone orders today are for Kellogg's Whole Wheat Biscuit. It says shredded wheat on the Kellogg package; but we do not want to have it known as shredded wheat. The more we can get it over as Whole Wheat, from a sales standpoint, the more effective our advertising is and will be.

We get both kinds of package, cellophane and noncellophane. It costs me approximately fourteen cents a case for the cellophane package for Texas consumption, which is rather steep. That is left up to the district manager. We are specifying it all cellophane packages to certain sections of the district. Where we feel we can use the other to good advantage, we order the package similar to it. I could not picture to you just how the non-cellophane package looks. We have some in the new-style package. I did not observe and do not know when the package was changed with the picture of the dish and two biscuit.

RE-DIRECT EXAMINATION.

THE WITNESS: It might be unsafe to say that Plaintiff's Exhibit 165, on which the product is called Kellogg's Shredded Whole Wheat Biscuit, is no longer sold in this territory, because small stores may buy a case and move it very slowly. It may remain on their shelves for an indefinite period. I do not know whether the Kellogg Company still maintains a small

volume of it under that name; but I do not know of any being sold by the company in my district.

We did not have anything to do with the composition of the ad, Plaintiff's Exhibit 180. That is an article, and the papers run them for us practically all over Texas. They are worded differently in the towns. Referring to our records this morning, we found two hundred and ninety-three towns in which that type of co-operation was obtained. In a larger percentage of them, articles of that nature appeared, as a matter of newspaper courtesy.

The practice of dealer advertising referring to our product as Kellogg's Shredded Wheat is distinctly on the decrease. We did not take any actual steps on that; but our whole campaign of advertising has been directed at establishing the Whole Wheat Biscuit, as we do on various other products we introduce, so we can get out here and do things for Whole Wheat Biscuit and not sell shredded wheat biscuit. I do not recall seeing any advertising referring to our product as shredded wheat, recently. As I told Mr. Vilas, the sampling by Kellogg's might possibly have stimulated the sale of National Shredded Wheat. It is a matter of policy, arrived at through general experience in selling Kellogg's Corn Flakes in Texas; and I thought there might be a similar effect on this product. We did put out some small samples; but I quote this to show you we cannot be sure of any deductions we might make. The man we sampled through at San Antonio is today one of the outstanding outlets for Whole Wheat Biscuit; and that sampling was done about four years ago.

From the testimony today, as far as concerns the two major markets, there can be no doubt that sampling by selling one full-sized package and giving one free is very, very effective. It has increased the consumer demand very materially.

In my opinion, the entry of Kellogg into the shredded whole wheat biscuit field has increased the total volume of that product used. I do not think there is any doubt that the two companies together are now selling more shredded wheat biscuit than the National was selling before. With two aggressive manufacturers in the field, you will market and sell more.

RE-CROSS-EXAMINATION.

THE WITNESS: In Texas, I would say they are selling twice as much, because the per capita sale of shredded wheat was way below the consumption on the coast or in New England. I should think our entering this market has not affected the National Biscuit sales to anywhere near the extent of our present volume, which is partly new consumers and partly old shredded wheat consumers.

RE-DIRECT EXAMINATION.

THE WITNESS: I think our package with the color scheme of our line, and by changing our packages occasionally and making them more modern, helps the sale of our product. We believe in changing the package, not the color scheme necessarily. Our biscuit is better, due to the more economical size. That has a large bearing on the situation, in my estimation. The biscuit is used by every member of the family, not a product only one individual of the family may like. The biscuit is smaller, an economical feature, and a very good sealing point; also the fact it is toasted on both sides, browned on both sides, quite a factor in selling our biscuit. There are more biscuit in the actual weight of the package.

RE-CROSS-EXAMINATION.

The Fort Worth Wholesale Grocery Company, jobbers, are one of our customers. The bunch of pink

sheets, colored pink, dated September 19, 1932, Plaintiff's Exhibit 181, is an authentic weekly price list put out by that concern. On page 4 is a column headed: Kellogg's Line, in which they feature: Shredded Wheat, twenty-fours, \$1.95; and, down below: Other Cereals, thirty-six's, Reg. \$3.60. The Reg. stands for *regular*. That is the term they use on there: regular pack, to distinguish it from individuals—the family size. That price of \$1.95 per case varies. Both Kellogg and National Biscuit had deals last year. If you reduce the second item one-third, that would produce \$2.40 for thirty-sixes, twenty-four of them, as compared with \$1.95 for twenty-fours carried under Kellogg Line.

BARTON V. ANDERSON (Recalled).

Deposition taken at Dallas, Texas, February 14, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have produced some pairs of various competing products here today. Kellogg's All-Bran and Post's Whole Bran, Defendant's Exhibits 31 and 32, are recognized in the trade as competitive products.

Defendant's Exhibits 33 and 34, Uneeda Graham Crackers and Brown's Graham Crackers, bought in this market by me, are directly competitive packages. They are placed on the shelves of the market, side by side. It is the same product made by different manufacturers.

Defendant's Exhibits 35 and 36, Sunshine Dutch Rusk and Holland Rusk, I bought them in this market and they are directly competitive products.

Defendant's Exhibits 37 and 38, Brown's Vanilla Wafers and Uneeda Vanilla Wafers, were bought by

me in this market, and they are directly competitive packages.

Defendant's Exhibits 39 and 40, Van Camp's Spaghetti and Thrift Spaghetti, bought by me in this market, they are directly competitive packages.

Defendant's Exhibits 41 and 42, Swans Down Biscuit Mix and LaFrance Biscuit Flour, I bought them in the market and they are directly competitive packages.

Defendant's Exhibits 43 and 44, Uneeda Assorted Biscuit and Sunshine Specialties Assortment, bought by me in this market, are directly competitive packages.

Defendant's Exhibit 45, package of Baker's Concoct, was bought by me in this market, as was Defendant's Exhibit 46, Premier Spaghetti.

Defendant's Exhibits 47 and 48, Van Camp's Kidney Beans and Premier Beans and Pork, were purchased by me in this market and are directly competitive packages.

Defendant's Exhibits 49 and 50, Van Camp's Spaghetti and LaChoy Shredded Sprouts, were bought by me in this market and are directly competitive packages.

Defendant's Exhibits 51, Van Camp's Hominy; 52, Beech Nut Pork and Beans; 53, Battle Creek Fig & Bran; 54, Van Camp's Hominy; 55, Beech Nut Spaghetti; and 56, Baker's Sweet Potato Shredlets, were purchased by me in this market.

Defendant's Exhibits 57 and 58, Dunham's Original Shred Coconut and Baker's Coconut Shredded, were bought by me in this market and are directly competitive packages.

JOHN WILLIAM BASKETT.

Deposition taken at Dallas, Texas, February 15,
1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty. I call upon cafes and institutions for the Kellogg Sales Company, with whom I have been four years next month. Before then, I worked a short time as window display man for Palm Olive Peet Company. I now calls upon hotels, restaurants and institutions, which I have been doing since I went to work for the company. I solicit orders from them.

I am familiar with the product known as Kellogg's Whole Wheat Biscuit and have been since about the time I have been with Kellogg. I cannot say I was conscious of it before. My territory is, roughly, the State of Texas, the Dallas district. I have sold Kellogg's Whole Wheat Biscuit in that territory to the class of institutions I mentioned. It is sold in the individual size to restaurants and hotels, and in standard-sized packages usually to institutions, except some which use it in the individual size. The distribution of Kellogg's Whole Wheat Biscuit in my territory in individual size cartons, to restaurants, hotels, cafes, and the like, is seventy out of a hundred. The product is generally displayed in restaurants on the back bar, the pie case, or places they have for displaying fruits and canned goods. Also, there is nearly always a display of packages of various goods set up in view of the customers, with the idea of causing them to buy it, a permanent cereal display on the back bar.

I have knowledge of the general practice in restaurants, hotels, etc., in serving Kellogg's Whole Wheat Biscuit. I have seen them serve it. They usually take the end of the carton off. They do not cut it as they would do a box of bulk cereals, which

would destroy the biscuit. They just cut or tear off the end of the package. Sometimes it is set down for the customer to take them out. More generally a bowl is set in front of the customer, the waitress takes the end off the package, puts the biscuit into the bowl in front of the customer. Sometimes they do not bring it right in front of the customer; but, more generally, they perform the operation in front of him. Sometimes they touch the biscuit with their hands in putting it into the plate. When they do not use the hand, I do not know how they get the biscuit out of the package.

I am familiar with shredded wheat of the National Biscuit Company. We encounter it in some of the restaurants we service with Kellogg's biscuit. It is more frequently in the individual package, of which they have more than one size. Each package contains two biscuit. I have encountered both the larger individual carton, Defendant's Exhibit 59, and the smaller carton, Defendant's Exhibit 60, in my trade in Texas. I have known the larger of the two longest. Since my experience in calling on the cafe trade is the first I remember seeing Defendant's Exhibit 59. I have seen Defendant's Exhibit 60 a year or a little more. I do not remember just exactly when it came out. Here it came out after the Kellogg package, Kellogg's individual, quite a little while after. The smaller one, Defendant's Exhibit 60, is seen by far more in the markets now. It has a larger distribution than the larger individual carton of the National Biscuit Company. I thought, until recently, the larger package had been discontinued with the advent of the smaller one, which is far in dominance over the larger one, in the Texas market.

The only change in size I know of is that represented by the biscuit in cartons, Defendant's Exhibits

59 and 60. I see no other difference between them, except as to size.

The Kellogg individual cartons are distributed to the trade I service through the wholesale grocery companies. I take orders for them and transmit them to the wholesaler for selling. Many of the orders in my territory are transmitted to the wholesalers direct. It is not possible for me to get them all.

I have not encountered in the wholesale trade any instance where Kellogg's Wheat Biscuit in individual cartons has been returned to the wholesaler on the ground the National Biscuit carton was intended to be ordered. I only know one instance of National Biscuit being returned because Kellogg's biscuit was wanted, in Fort Worth, Rainey's Eat Shop. Mr. Rainey died since that happened. He favored our biscuit, before that smaller size came out. He asked for Kellogg's Whole Wheat Biscuit, and the other was sent him. He returned it and said he wanted Kellogg's. They sent it to him a second time. The salesman for the wholesaler finally told Mr. Rainey they were sent to him so he could give a larger serving for the money to his customers. Mr. Rainey told him he did not want it because he wanted to give the same amount of cream he did with his other cereals. He sent it back two or three times before he finally got Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: My experience with the Kellogg Company is my only experience with food products in the business, since my student days. I have clerked in grocery stores. I do not believe I was ever really conscious of knowing shredded wheat when I was a kid in school. I still am not conscious. In small towns, I would not swear they had it in a store in that par-

ticular place. I did not always live in Texas. I came from Kansas. We usually had corn flakes. I think a person usually has corn flakes on the shelf. We used cereals at home, but I do not think we had shredded wheat.

When I stated I did not see any differences between Defendant's Exhibits 59 and 60, I did not see the word *sample* on Defendant's Exhibit 59. The printing on the packages is in different form; the smaller package, Defendant's Exhibit 60, being printed horizontally, and the other vertically. I did not purchase these packages, and I do not know where they got them from. We got them in a retail store, Wyatt's Store, Tenth and Lancaster, at Oak Cliff, not in a restaurant.

(Photograph of interior of Wyatt Self-Serv-
ice Store referred to, in Dallas, was marked in
evidence as "Defendant's Exhibit 61.")

My duties include Texas generally, except El Paso and some other places. I cover the same territory Mr. Wilde has in his jurisdiction and travel through it. I do not believe I could tell you how many cafes and restaurants there are in that territory. It would necessarily be a rough estimate, since there are many little districts. In calling on them, it is not possible to work the entire territory clean and get to all the important markets. There are places I have not been to. I should think there are two thousand over this territory. I do not try to visit all from time to time. I try to make a complete canvass of the more important ones, including hotels and the restaurants in the larger cities, along the main streets. In my visits to restaurants, I encounter shredded wheat. My product is in competition with it in a great many of them. They are both displayed in the individual package. I could not say the practice of serving either product in indi-

vidual packages is universal, but by far the majority of the places handling their product do serve it in individual packages. It is occasionally served in a dish. I do not know of any instance where it is served with the display of the package at all. It could happen. I never experienced in a hotel ordering shredded wheat and having it brought to me from the kitchen in a dish. I do not order shredded wheat often, but I cannot recall that it happened.

I learned of the Rainey instance by talking to him one morning. He brought up the subject himself, wanting to know why they did not handle our biscuit up there. He knew they did, because he finally got it. Mr. Rainey shot himself with a shotgun in a hunting accident, which had nothing to do with his being unable to get Kellogg's. He ordered and specified Kellogg's Whole Wheat Biscuit, that he needed to satisfy a particular customer. He knew what he wanted. I did not see the order; it was purely conversation, taking place about two years ago.

My idea of seventy per cent. distribution is just an estimate, what I think about it, going around in my experience among the trade. I do not claim I have actually visited or solicited every possible outlet of that kind in my territory. I do not find the larger sample package, Defendant's Exhibit 59, generally in the cafes in my territory; it is mostly Defendant's Exhibit 60, the smaller size.

RE-DIRECT EXAMINATION.

THE WITNESS: I would not say I do not encounter the larger size at all. I find it from time to time. The only reason I assumed the larger size was discontinued is that I find those on display seem quite old. I have not encountered any new supplies of the larger ones.

Defendant's Exhibit 1, has, in the little panel, instead of *sample*, as on Defendant's Exhibit 59, *individual service*. That is the type of National individual I formerly encountered in my trade. There are wholesalers in this territory who service the restaurant trade, with sales representatives who carry Kellogg's Whole Wheat Biscuit. They are services by others than myself. I am not the only person selling Kellogg's Whole Wheat Biscuit to the restaurant and cafe trade.

MRS. W. L. HOLLAND.

Deposition taken at Dallas Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, appearing here as a witness on request of a friend of mine, Mrs. Wilde. I know and have been using Kellogg's Whole Wheat Biscuit. I have used it about two years. I have used so many Kellogg products I used this, too, and I first found it in a cash-and-carry self-service store where I go and help myself, where I buy other Kellogg products. I found it on the shelves of the store, bought it and used it, and liked it. I have continued to use it since. Kellogg's Whole Wheat Biscuit is a shredded whole wheat biscuit. A long time ago I used to use another one. I do not even know the name of it. Since I used Kellogg's biscuit, I stopped using the other one, because there are more in a package, just the right proportion or serving. It is the right size for anyone's breakfast.

CROSS-EXAMINATION.

THE WITNESS: When I say the other one, I mean like Plaintiff's Exhibit 1, the one I used. I remember that. It is a good while since I used that. I called Kellogg's biscuit shredded wheat biscuit, because they

are all shredded. This is shredded and the other one, too. I do not know why I used the expression shredded to Mr. Clarke, as to that product. I got this first one I had a long time ago, the first one I used, the first one I knew as shredded wheat, a long time ago. I knew it as shredded wheat, and Kellogg's biscuit is very much like it. It is a smaller biscuit, with more in a box. That is why I immediately thought of it as a shredded biscuit. They look very much alike to me, except there is more in a box and a smaller proportion than the other. I am in the habit of using all Kellogg Products; I do not know just why. I have used them in my home, all kinds of flakes, rice, and so on. I have bought them in stores where I deal. I did not notice whether these biscuit are in some of these stores, too, nowadays. I find the other Kellogg products by themselves and help myself to those I want. That is all I was interested in.

MRS. J. A. SHARP.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, invited here today as a witness by Mr. Wilde. I know Kellogg's Whole Wheat Biscuit and have used it, off and on, for several years. I saw it advertised, in the papers, also on the grocery shelves. I tried some of it, liked it, and have continued to used it. It is just a shredded wheat biscuit. It is made of shredded wheat. I have known of another shredded wheat biscuit, Plaintiff's Exhibit 1. I have used that before I used Kellogg's biscuit. I believe I find that in almost all the stores with which I deal. I deal with A. & P., Piggly-Wiggly, and all the chain stores, self-service stores, where I go in, go around the counters, and take what I want. I believe I use almost all the Kellogg products. I like them.

Cross-EXAMINATION.

THE WITNESS: I have known Plaintiff's Exhibit 1 for a long time, before I knew Kellogg's biscuit. I do not remember how long; but I have noticed it on the market quite a while. I have had it at home, too. When I saw Kellogg's biscuit I thought it was similar to the other, enough similarity, so I readily described it as shredded wheat. They said Whole Wheat Biscuit, but I thought it was shredded. I called it shredded. I do not know why I called it shredded wheat biscuit so quickly. Just because it is shredded wheat in my mind. That is what I would call it. That is what it is. That is how I think of it when I see it. I talked to Mr. Clarke just for a minute in the other room before I came in here. I was not asked then if it was a shredded wheat biscuit.

I have known Mr. Wilde for several years. I have been a user of Kellogg's products for some time. I do not believe he called my attention to this Whole Wheat Biscuit. When I purchase it, I find it along with other products. I also see Shredded Wheat on the shelves. I find it in packages like Plaintiff's Exhibit 161, lately, with the window inset. I do not remember how long I have been using the Kellogg biscuit, but it is always since it has been on the market, several years. I get it at chain stores, A. & P. and all of them. I guess I trade regularly at the A. & P. stores. I trade at the Piggly-Wiggly quite a little. I believe I buy it most of the time at Piggly-Wiggly stores and Safeway stores. There is an A. & P. store in my neighborhood. I do not know how long I have been buying it there, a year, anyway, or six months, something like that.

Re-DIRECT EXAMINATION.

THE WITNESS: Piggly-Wiggly stores are a large chain. I do not believe I know them in any other city except Dallas.

MRS. B. SONNTAG.

Deposition taken at Dallas, Texas, February 15,
1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, appearing today at the invitation of Mr. Anderson, of the Kellogg Company. I am not conscious of any prejudice or favoritism one way or the other, as between the National Biscuit Company and Kellogg Company, that would influence or color my testimony.

I know the product, Kellogg's Whole Wheat Biscuit, as shown in Plaintiff's Exhibit 161. I think, about six or seven months ago, there were some house-to-house boys bringing samples around. I bought two packages, and they gave me one. That was the first time I ever used it, the first knowledge I had of Kellogg's biscuit. I used those packages, liked the biscuit, and have continued to use it since. Other members of my family have used the biscuit since. It is a shredded wheat biscuit. I had used before the other shredded wheat biscuit, but not for several years, because we did not care to eat them at all. I just did not care for them. When Kellogg began making it, I began using shredded wheat again. I bought Kellogg's biscuit from Piggly-Wiggly, which are self-service stores. I go into the store, pick up packages, and wait on myself. There are quite a few Piggly-Wiggly stores in this market: I use Kellogg's Pep and Whole Wheat Bran all the time. I like those products. I find Whole Wheat Biscuit in Piggly-Wiggly Stores right with the other Kellogg products, in that same section.

CROSS-EXAMINATION.

THE WITNESS: I have known National Biscuit Company's shredded wheat for a number of years. I

recognize the package, Plaintiff's Exhibit 1. During all the years I have known that, I have known it as shredded wheat. I think that is why I so readily defined Kellogg's biscuit as shredded wheat. It looks like the other, resembles it in many ways. I like the Kellogg's shredded wheat better. When the boys came to the door with their Kellogg samples, I do not remember what they said. I remember I bought them because they were Kellogg's products and I would, they said, find the biscuit different, which I did, because they were so much crisper. I do not think they told me Kellogg's biscuit was a shredded wheat biscuit. They sold it as Whole Wheat biscuit. They made some comparison. I do not know what with. It has been so long ago I do not recall. When they said I would like the biscuit and find them better, they compared them with the old shredded wheat biscuit I was familiar with. That is what they must have said if they said I would like them better. They sold them as better than the old Shredded Wheat, I guess, that I was familiar with.

RE-DIRECT EXAMINATION.

THE WITNESS: When I bought the biscuit and tasted them, I knew they were not like the other shredded wheat biscuit. It was a better flavor, and they were browner, tasted browner and crisper. Their size was smaller. They went into my bowls much better. I did not have to break them in two to put them into my bowls. I noticed that the first time I used them.

RE-CROSS-EXAMINATION.

THE WITNESS: I heat them for quite a while sometimes. When I first open the package, I do not have to heat them so much. I put them into the bowl and put them on the table. There are six in my family at the present time. I take them out of the package in the

kitchen or pantry, heat them if necessary to restore their crispness, and then put them in the bowl and on the table.

RE-DIRECT EXAMINATION.

THE WITNESS: When the boys came to me with the Kellogg package, I am sure the Kellogg Company was mentioned at the time. I bought them because I had used Kellogg's other products and knew they were good. I had confidence in them.

MRS. RUBY McDADE.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife, appearing here at the invitation of Mr. Anderson a friend of mine. I am not conscious of anything that would prejudice me for or against either the National Biscuit Company or the Kellogg Company or color my testimony in this case.

I know Kellogg's Whole Wheat Biscuit, like Plaintiff's Exhibit 161. I use it from time to time. Our family is small. We do not use it very much. They brought it to the door, to buy two packages and get one free, which is the first time I had heard of the product. I bought it, for the main reason a cousin of mine was selling them, distributing them through the whole neighborhood. I bought them, used them, and liked them very much. I would describe the Kellogg biscuit as being shredded wheat biscuit. I have known, also, of the National Biscuit Company's shredded wheat biscuit, like Plaintiff's Exhibit 1. I have used the National product. I do not continue to use them regularly. I had been using them for some time

before Kellogg's biscuit came to my door. I have known this old product for a long time. It has been some years since I used the National shredded wheat. I used them once in a while. We never did use anything regularly. Not having used it for some time, I used Kellogg's when it was brought to my door in these packages. I have used Kellogg's Wheat Krispies, and Kellogg's Corn Flakes. I had heard of the Kellogg Company before these biscuit were brought to my door.

We usually trade with Killingsworth, a home-owned chain store, self-service. I do not remember where I find Kellogg's Whole Wheat Biscuit in that store. I think they have the same kind of products all along on the same shelves.

CROSS-EXAMINATION.

THE WITNESS: I have known shredded wheat biscuit for a long time, about fifteen or twenty years. It has been on the market, always in a package like Plaintiff's Exhibit 1, with a picture of Niagara Falls on it. I remember that. We have had it in our house from time to time, not regularly. The same is true of Kellogg's Whole Wheat Biscuit. We do not use it every day, and we never had it until my cousin came over to my house. I bought it from him because he is my cousin and I wanted to encourage him. Then I bought it again. We use it maybe once or twice a month, because I use other cereals, too. I describe it as shredded wheat, because there is shredded coconut and shredded cabbage. It is just like shreds. I saw right away when it was shown to me that it was just like any other shredded product. I really cannot think of any other shredded product in biscuit form like that. That is the only product I can think of, put up in that form. When I see the Kellogg biscuit through the window in the package, I recognize it right away as a shredded

wheat biscuit, naturally. We serve them in our home two or three ways, sometimes scalded. Sometimes we put half a cup of boiling water, salt, pepper, butter, and serve it with cream. We do that in the kitchen and serve them to the family. There are three in our family.

RE-DIRECT EXAMINATION.

THE WITNESS: Kellogg's shredded wheat biscuit is smaller than the other. It goes a little easier in the dish we use. I noticed the difference in size the first time we used Kellogg's.

RE-CROSS-EXAMINATION.

THE WITNESS: When my cousin came to the door he did not open the Kellogg package; just asked me if I would buy them, and I did. He did not have to make any selling talk to me. I wanted to help him out.

GEORGE F. ROSELLE.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am fifty-one. I am district manager of the Eastern Division of Waples Platter Company, distributors of groceries on a wholesale basis, also manufacturers, coffee roasters. They distribute to retail stores. They service northern and northwestern Texas, southern Oklahoma, and part of New Mexico. We have men traveling in the territory, about eighty or eighty-five. Those men contact the retail stores as regular customers and take orders. My organization handles this product, Kellogg's Whole Wheat Biscuit. They have handled it, I would say, four or five years. I would describe it as whole wheat

biscuit. It is a shredded wheat biscuit. We offer it as a whole wheat shredded wheat biscuit.

We do not now handle any other shredded wheat biscuit except Kellogg's Whole Wheat Biscuit. We have handled another shredded wheat product, this particular product, Plaintiff's Exhibit 1, about three to four years ago. We have discontinued handling that product, because of a decline in sale and profits with us. We did not want to carry the two lines. We had taken on the Kellogg line before we discontinued the National. Since then, we have handled nothing but Kellogg's Whole Wheat Biscuit. We service our trade with that biscuit and have never had any rejections by the trade of it that I know of. We register our orders, but we do not carry them numbered. We do sell this piece of goods by the factory numbers. It is so entered. We list that in our cost book by number. If our trade asked me for Kellogg's shredded wheat, I would supply that package to them. I could not give you the volume of our business in Kellogg's Whole Wheat Biscuit accurately, because we have not segregated it. We have had a growing business. We consider the volume we handle large. It would be most difficult to estimate how many retail stores we service as wholesalers; several thousand, though. I would say a large proportion of them buy Kellogg's Whole Wheat Biscuit from us. I could not tell you to what extent.

CROSS-EXAMINATION.

THE WITNESS: We distributed Shredded Wheat like Plaintiff's Exhibit 1 many years back. I have been with this house off and on for twenty-seven years. I would say that, during all that period, up to about five years ago, or about three and a half years ago, we carried the shredded wheat of the Shredded Wheat Company. Then we discontinued it. Prior to then we

had had it continuously. We stocked it, but we have handled that off and on. I do not know it has ever been a volume seller with us. I have known about it, however. It was a fairly well-known product, I think, in our market, known as shredded wheat. We were handling both kinds when this was discontinued. We had a decline in business on that particular piece of goods, Plaintiff's Exhibit 1. On Kellogg's biscuit, they had a more attractive price. Kellogg's Whole Wheat Biscuit, with us, gradually supplanted Shredded Wheat Company's shredded wheat.

The Kellogg Company advertise their product. They have, as far as my house is concerned, created some market for it. We have call for them. We do not, out and out, engage in chain store business, that I know of. I cannot answer as to whether we are interested in any organization or combination or association of retail stores. I do not know the inner workings of the organization. I am not trying to hold out on you; just trying to answer your question honestly. If I knew, I would tell.

I cannot say that there is a more or less cohesive group of stores looking to my house as sponsor for certain goods, for this reason: We contact thirteen or fourteen chain institutions in Dallas; but we have no stock investments or ownership in them. Those men favor us in a substantial way. We have no direct relationship with that group. There is no other group that I know of, that we have any direct working relationship with. I cannot speak for all the houses in the organization. There are two divisions, eastern and western. I am speaking for the eastern division. As far as that is concerned, there is no particular relationship with any group of retailers, other than the general contact.

The shredded wheat we discontinued carrying some years ago is, as far as I know, still carried in

Dallas retail stores. They obtain their supplies, I understand, from the National Biscuit Company and through jobbers. We do not have it. I would not say our house has handled any shredded wheat in the last two or three years, because I do not know what has gone into our western division houses. It may be we have handled some shredded wheat in the last two or three years. If we have, it has been in very limited proportions. If we should have a call for it, we would more than likely be glad to send and get it. We would be glad to do it as an accommodation. I do not know we have in the last two or three years, secured supplies of shredded wheat from the National or one of its branches. We may have. I am not the buyer, but I have supervision over sales. I have handled it. If we have a demand for one, it is our custom to go out and buy it, because we want to serve our customer. When we have a call for just shredded wheat and nothing else, we ship them Kellogg's. As far as I know, the shredded wheat you mention is not under that name. Our classifications call for certain products. If we had a call for shredded wheat biscuit, we would ship it. If we had class for this, I would not know how to classify it. If they called for shredded wheat by one of our salesmen, I would tell them we do not have it. If he called for shredded wheat, I would ship him the Kellogg product. I would only know when a customer calls for shredded wheat through our salesman's efforts. He can make or lose a sale. If he loses it, we would not know it.

In running a survey, our men told me frankly they just have calls for shredded wheat biscuits. That order is filled with Kellogg's shredded wheat biscuit. I think possibly we fill the order occasionally with the product made by the National Biscuit Company. If they ask for it, I do not know they want that, unless it would be specified. I would imagine they would

say they did not want Kellogg's. If we filled an order with Kellogg's Whole Wheat Biscuit and the customer did not want it, he would be apt to say so.

RE-DIRECT EXAMINATION.

THE WITNESS: Our retail customers usually know what they want. If we shipped Kellogg's biscuit to one and he did not want it, he would reject it. The salesmen are instructed to make it clear when they call what biscuit we are handling. I have no doubt at all that the trade and we understand each other as to what is meant by shredded wheat. When we ship Kellogg's Whole Wheat, we would naturally assume that the hotels and restaurants, when they say shredded wheat, naturally mean Kellogg's shredded wheat. We would naturally assume that.

I do not think a wholesaler could continuously palm off on the retailer anything the retailer did not want. If he tried it, the result would be dissatisfaction in business and loss of business. If an order was filled by shipping goods the retailer did not want at all, he would have the right to reject them. The practice of substitution between wholesaler and retailer is not prevalent. If he has had any experience, the retailer is not an unskilled buyer who does not know what he wants. If an order should have come to us from a retailer specifying he wanted the other shredded wheat, we would have sent out, got it, and filled that order. If the retailer told me he wanted the National product, such as Plaintiff's Exhibit 1, specified that, I would send out and get it. The stock number I spoke of is on Kellogg's. Sometimes our salesmen order it by number.

It is my understanding that the National Biscuit Company are going direct to retailers and servicing them in connection with their cracker sales. What

the other jobbers are doing I do not know. I also understand the cracker salesmen are salesmen of the National shredded wheat.

If my salesmen are traveling our trade or soliciting orders for Kellogg's Whole Wheat Biscuit under any other name, it would be my assumption that the National Biscuit salesmen are also traveling the retail trade and soliciting orders for their products, and that those retailers are being solicited by my organization to buy the Kellogg product and by the other organization to buy the other biscuit.

RE-CROSS-EXAMINATION.

THE WITNESS: We have something to do with Helpy-Selfy Stores, a chain store, local only, in Fort Worth, a stock company, as I understand. My company has no financial interest in it, that I know. I know they have served that chain of stores ever since its inception. The chain was formerly organized by a former Dallas man, Mr. Long. He made the investment. Later on, there was, I understand, a merger between Helpy-Selfy Stores and Alexander Bales. They are now operating under the trade name. As to stock investments and other loans I cannot tell you. I do know our company services those stores. We do not have our man in the Helpy-Selfy organization. There is a man who serves them as president of the organization who was formerly in the service of Waples Platter Company, a very able man. When he left us, his relationship was severed in its entirety. It would be natural that he would have good will for our company and patronize it. As to his investments either way, I just could not tell you. I have had no occasion to inquire.

H. G. WILLIAMS.

Deposition taken at Dallas, Texas, February 15,
1933.

DIRECT EXAMINATION.

THE WITNESS: I individually own and run the Topic Cafe, in Dallas. That is my only business. It is a sort of second-grade restaurant. It is pretty hard, in my estimation, to get a first-grade restaurant. If Mr. Wilde says it is a first-class restaurant, I would not take issue with him. I do not want to overstate the matter, but I guess it is as good as the average. It is at least a B cafe. If Mr. Wilde calls it A, I have no objection.

I have had that place since 1913. I know Kellogg's Whole Wheat Biscuit and handle it in my cafe. I think I have handled it since it came on the market here, in the small cartons, like Plaintiff's Exhibit 183. That is the only size carton I carry Kellogg's in. I do not remember ever having or seeing any in a carton like Plaintiff's Exhibit 161. My best recollection is I have carried it in this small carton only, since the time they first appeared in this market. I sometimes buy them through a salesman of Kellogg and something through a jobber. There are regular jobbers for restaurants who have their salesmen call on me regularly. I put in orders through them and through Kellogg salesmen. I do not know whether I ever telephone orders direct to the jobbing house. Several people call on us every morning. We seldom find it necessary to telephone for anything. We have our lists and get everything we want. I do not remember the exact words I tell the salesmen, but I suppose I would say: Kellogg's wheat biscuit. When I order them, I always get them. I never have had any confusion about getting the Kellogg product. I do not remember any time I have ordered it that I have ever

gotten anything else but this product. We generally put all kinds of breakfast cereals around on pie cases, display boards, and so forth, so they will be visible to our customers just like any other commodity. Some of them might not see it. They might say, "I will take some shredded wheat." Others might say, "I will have some Kellogg's biscuit." I never paid any real particular attention. I have had them just point and say: "Give me some of that." We never have any complaints from customers when Kellogg's is served to them. The way I try to have all cereals served is to cut the package and set them in the bowl. When that has not been done, it was because of new not properly trained help. Sometimes I work there at night myself. Many people eat cereals at night. I take it and cut it in his presence. He knows what he is getting. Letting him pour it out, I do not know there is any difference.

CROSS-EXAMINATION.

THE WITNESS: I do not know whether I carry this item on the menu. I do not think I made these menus myself. I had another place at that time. My wife probably made them. I think I would put just cereal with cream. I do not think I would specify any cereals. I do not believe I carried shredded wheat on my menu. I have carried shredded wheat like Defendant's Exhibit 59, also like Plaintiff's Exhibit 1. I do not know whether I have any on hand now or not. I would have to look. There is no reason why I should not have both. I have no prejudice in the matter whatever.

If I had both on my shelves and my customer asked for shredded wheat, I do not know what I would serve him. I would ask him what he wanted. I or the girls would ask him. The way I see it, there are two kinds of shredded wheat. I have known shredded wheat like Plaintiff's Exhibit 1 a pretty long time, longer than I

have known Kellogg's Whole Wheat Biscuit. I have been in the restaurant business too long. I have had this place since 1913. I have been in the same block and changed buildings a time or two. During those years I carried shredded wheat biscuit. Customers asked for shredded wheat and got that. At present, if a customer asked for shredded wheat, he might get the National Biscuit Company product or the Kellogg product.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know which brand I personally like best. I do not eat very much shredded wheat. The only thing is I can see the individual package is generally fresher and I like it a little better myself. I have no prejudice in the matter at all, of any kind; but I prefer Kellogg's.

RE-CROSS-EXAMINATION.

THE WITNESS: I know I can get this shredded wheat in the individual size, too.

RE-DIRECT EXAMINATION.

THE WITNESS: I have never had any complaint at any time I have served the Kellogg package on an order for shredded wheat or whole wheat, or wheat biscuit. I have never had any customer say that was not what he wanted.

DUNCAN MONROE INMAN.

Deposition taken at Dallas, Texas, February 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have been conducting my own cafe in Dallas. I say it is a C cafe and some people say I am B. We do not get the prices they do. We do not have a chef and so forth.

I carry Kellogg's Whole Wheat Biscuit in the individual package only, like Plaintiff's Exhibit 183. I have handled it about two years. I put it on the shelf and list it on the menu. It is within the customer's sight on the shelves. They ask for shredded whole wheat. I very seldom serve one of them. The three girls I have there often serve them. They open it up and put it out in the bowl, right back of the counter where you eat it, so the customers can see what they are doing to it, and just dump it in the bowl right there; or sometimes they break it in two, if it is an old or crippled person. That is just service for them.

When we serve Kellogg's Whole Wheat, we have no complaints from the customer. They never say it is not what they want. They just say they want Whole Wheat Biscuit. If they do not complain, we assume they are satisfied.

One carton of National shredded wheat just came in. Regardless of which they have, if I can buy them at the same price, it is all right. If I am out and the Kellogg man comes along, I will buy several dozen from him at one time. If the coffee man comes along, I just order one dozen shredded wheat, and he sends me whichever he wants. I think they charge about thirty-five cents a dozen for it. I do not ask for any terms, and I do not care which I get. I am going where I buy the cheapest. I think I have them like Defendant's Exhibit 59 on my shelf right now. I have some of that and some other product. I have no biscuit that size. I might rather have little biscuit. They might not get enough out of that one. If a customer does not get enough out of that, they might buy also a doughnut and a cup of coffee. I have never asked for either specially. I would rather serve Kellogg's than the other, because I might sell a doughnut or cup of coffee on the side. My customers are all working men with good appetites. They are all hard workers. I do not know whether

Kellogg's Biscuit is smaller. I do not think I have opened half a dozen packages of them in my life. I understand one package holds two and the other three. Defendant Exhibit 59, I think; holds three biscuit.

CROSS-EXAMINATION.

THE WITNESS: I do not have Plaintiff's Exhibit 60, I think. I would not be positive. I think one of the two biscuit is a little bit larger, that I serve. (I am not positive. From time to time, I have both Kellogg's Whole Wheat Biscuit and shredded wheat biscuit on my shelf, for them to order whichever I happen to pick or the girl. They ask for shredded wheat, but they do not say National or Kellogg's. We have it on the menu as shredded wheat. I get fifteen cents for either product. It makes no difference to me which I give and it does not appear to make any difference to my customers. We never have any complaint, that I know of,

DAVID H. BERGEY.

Deposition taken at Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am buyer for Durand-McNeil Horner Company, wholesale grocers and sponsors of a voluntary chain, the Shield Quality Stores. We service that chain, also other stores not in the chain. We do a regular jobbing business to the grocery trade, also to the hotel and restaurant trade. I have heard of a product called Kellogg's Whole Wheat Biscuit and have known of it about nine to twelve months. I never knew of any similar product under any other name. I did not know it when it was called Kellogg's Shredded Whole Wheat Biscuit. Kellogg's Whole Wheat Biscuit is a regular stock item, which we service to our trade

on demand. We get calls for it right along. There is a regular demand for it. I would describe it as a shredded wheat. We handle another kind of shredded wheat, Shredded Wheat, or Shredded Wheat Biscuit put out by the National Biscuit Company. We carry both kinds. There is no confusion in our house in ordering those two brands. They are separate and distinct, listed that way, and sold that way. We have never had instances where one was returned to us with the statement they wanted the other kind. I am familiar with both packages. I do not think the Kellogg package has any similarity to the Niagara Falls package.

I recognize Defendant's Exhibit 4 as our regular package of Kellogg's Whole Wheat Biscuit. I am familiar with the other Kellogg packages. I would say the color scheme of this package is the same and the signature is the same, on the Whole Wheat Biscuit as on the rest of the line. There is a similarity to all other packages.

Looking at Plaintiff's Exhibit 161, with cellophane front, I have only seen that on Kellogg's Whole Wheat Biscuit. I have handled those packages. We have them now in stock and can service them to our customers out of the store. I think it lets the consumers see what they are getting, also lets Kellogg show what their whole Wheat Biscuit is. I would say it was an advantage. There must be a consumer demand in the retail trade for Kellogg's Whole Wheat Biscuit, because we get calls for it right along. I have no other knowledge about it.

The voluntary chain we service is about two hundred and twelve stores. We handled Uneeda Baker's Triscuit about a year and a half or two years ago. We discontinued it. I am familiar with its physical characteristics. We sold it as a cereal. Maybe that is why we did not sell much of it. I would describe it as a

pressed shredded wheat wafer or cracker. I have not handled it in recent years. The sales for Niagara Falls Shredded Wheat are not as big in recent years as they were some years back. I would say that is due to the fact there are more brands of cereals of all kinds on the market. There is more consumed; but there are more brands and more new products on the market, so it cuts down the sales of all brands, as far as the sale of any one particular brand is concerned. I think the sales of cereals now, as a unit, are greater than they ever were, but I think it is split up among more units, brands, or varieties.

We used to purchase Shredded Wheat from the Shredded Wheat Company at Niagara Falls. In our particular instance, when National Biscuit took over, for some unaccountable reason your business stepped up, going through our own channel, which I think was due to our men being anxious to get more business out of these stores, and maybe the National Biscuit men did not give it the attention it might have had. That business seemed to go over to the service grocer, which is what happened in our case.

Cereals is a separate and distinct line of selling. I do not think a cookie and cracker man can sell cereals as easily as those who specialize on it. I would expect more cereals to be sold by a regular salesman of cereals than by a cracker salesman.

We sampled Kellogg's Whole Wheat Biscuit to our salesmen. We do not do any direct sampling to the stores but sell them entirely through our salesmen. When Kellogg first came out with it, they gave us a round of samples. We gave each salesman two packages, one to eat and take home; one to carry and show. We do that with all new lines we take on. We give the salesman all the selling points we know or the factory passes on to us, so they are equipped to go out and sell it to the stores.

Our house handles Kellogg's Whole Wheat Biscuit in the individual two-biscuit cartons. We sell them to hotels, restaurants, and institutions. On all cereals, the individual cartons are fairly good sellers. I find there is a demand for Kellogg's Whole Wheat Biscuit in the individual size. It is immaterial to us. We sell it either way, whichever they specify. The hotel or restaurant usually specifies individuals. We also handle individual packages of Niagara shredded wheat. The hotel and restaurant orders come for those individual-sized packages principally. They usually specify which they want. We sell more individuals than large packages to the hotels and restaurants. There are two classes of trade on that. Eighty-five per cent. of our business is with service stores and fifteen per cent. is the hotel and restaurant trade. About ninety-eight per cent. of the cereal business in individuals goes to the restaurants. I think that either company, by putting their institution men on the chef's service and acquainting them with their product, could step up their business to practically a hundred per cent. individuals to restaurants, hotels, and institutions. I am sure the Kellogg men have been working with chefs to increase that individual sale.

We have rather a good bit of conflicting items in our business. In the big majority of the goods, there is practically always more than one making practically the same item. It does make competition a little more keen, and it would split up the volume. I could not say as to whether competition in shredded wheat has been more or less keen since Kellogg came into the field. I think it has brought the consumer's attention more to that class of cereal, with two companies working on a similar product.

CROSS EXAMINATION.

THE WITNESS: I sell some Shredded Wheat and some Whole Wheat Biscuit to restaurants in the large

package. I fill orders according to the specifications. If anyone specifies a large package, he gets it. Of our sales, that is a comparatively small percentage of the proprietors of cafes and restaurants, speaking of our company only. I have been in the grocery line twenty-two years, always in the wholesale end. That is all I know. I have never conducted a retail store.

All I have told you about consumer demand is from the point of view of their demands upon us through retailers. If I find that retailers are purchasing goods from me in considerable quantities, my inference is that they are taking them away from them, and that there is, therefore, a demand. I do not give you experience from contact with the consuming public direct. I described Kellogg's Whole Wheat Biscuit as shredded wheat, because it is shredded wheat. I myself know shredded wheat as a product that was put out by the old Niagara Falls company. I have known it for a great many years. I handled shredded wheat of the Shredded Wheat Company of Niagara Falls for a great many years before I ever knew of Kellogg's biscuit. I have known it as shredded wheat biscuit for the entire twenty-two years of my experience and longer than that. I used it as a consumer in my home.

XQ. 114. Is that not why you could not think of anything to describe that as, other than as shredded wheat biscuit? Is not the fact that you have known that product under that name for twenty-two years or more the reason why it leaps into your mind when you see it?

A. That is the first thought that leaps into my mind, the expression "shredded wheat," yes.

XQ. 115. That is the only expression that immediately comes to your mind when you see it?

A. That it is shredded wheat, yes.

THE WITNESS: I have seen that through this glassine front, shredded wheat. It looks like the old

shredded wheat biscuit that I have known so long. It looks as if the shredded wheat shreds are baked together, and it is browned, dry, and crisp. It has, also, the same pillow shape as the old biscuit I have known, in general, and it looks generally like the other biscuit. It is very natural for any one who would see it to say "That is a shredded wheat biscuit." I have only known this Kellogg product about a year. They brought it in, asked us to take it on and promote it, which we did. I still continue to carry the Shredded Wheat made by the National Biscuit Company, as a wholesaler, and distribute it to our retail clients. Our voluntary chain-stores, known as the Shields Quality Stores, also carry it. We service some of our stores, but they have the authority to purchase on the outside, if they can to advantage.

RE-DIRECT EXAMINATION.

THE WITNESS: Our stores carry the National Biscuit cookies and crackers. I know they can also obtain shredded wheat direct or from the National salesman. I do not know the sales of this shredded wheat of the National Biscuit Company; but I know, if you diversify your line, you do not get the results you do when you specialize. I do not know whether the National Biscuit Company has a cereal division of men who are devoting their time to the sale of cereals; but I know that the National Biscuit Company salesmen will take orders for Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: There is no confusion in our house between Kellogg's Whole Wheat Biscuit and shredded wheat. I do not think there is any confusion there. I can distinguish the two packages. If one of the two

were served to me in a dish without a package, I still think I could tell them apart. My testimony as to confusion with reference to those packages relates to my own house and my experience there. I would not make a mistake, and I do not think our salesmen would make a mistake. It may be possible that there are occasions when customers ask for Kellogg's shredded wheat. Questions like that would go through the order department, which I am never in contact with. I have nothing to do with making sales. I purchase the necessary goods, see that purchases are kept at the proper level, and promote them through our salesmen, give them all the selling points, and the differences, and so on, so that they will have it all clear in their minds, when they go in to sell. I have nothing to do with the filling of orders, and I am not personally familiar with the way orders are received and given. When Kellogg's Whole Wheat Biscuit was first put on the market, before the salesmen knew the difference, and until it was made clear to them, there was a little confusion, which lasted about a week. It was natural for them, seeing the biscuit through the window of the package, to call it shredded wheat biscuit. It was natural for us to sell it as that. That was the first thought that came into my mind. As far as our own salesmen and force are concerned, there would be no confusion any more; although I could not say that the trade does not sometimes call it Kellogg's shredded wheat. Our customers call up or send in orders for shredded wheat. I would fill such an order with the National Biscuit Company's product, which is what I know as shredded wheat. An order for shredded wheat would call for just shredded wheat and nothing else. If they asked for Kellogg's shredded wheat, we would give them Kellogg's Whole Wheat Biscuit.

I handled this Triscuit package about two years ago. I could not recall whether it was that package or not. I know it was an old shredded wheat product. We sold it as a cereal at that time. The way I distinguish that is that we have all our merchandise in the house split up into departments. If it had been featured as a cookie or cracker, it would have gone over to the National cookie and cracker division. Another buyer altogether handles that. We handle stocks of cookies and crackers.

When I said I thought the sales of shredded wheat were not so great as they were in past years, I have reference to the Niagara Falls outfit. I am only speaking of our experience. In my opinion, that was due to the increasing of the various cereal products on the market. I would say that that is the reason why Shredded Wheat with us was down. Another explanation might be that the National Biscuit Company was distributing shredded wheat direct to retailers, and it did not pass through the wholesalers as it had. That would answer it too, yes. I would not think that another possible answer to it would be the competition with the Kellogg's Whole Wheat Biscuit. I do not base that on the fact that I favor either company, because we handle both products. I base that on the fact that, with similar products on the market, the sale of one does not affect the sale of the other very much.

Kellogg's Whole Wheat Biscuit, as I have described it, will fill the same want as Shredded Wheat Biscuit, and it is a competing item; I would not say a more generally competing item than the general run of cereals. There are other cereals on the market of different competing brands that are practically the same. I did not say other brands of shredded wheat. I had reference to Post Toasties and Corn Flakes, two identical things, which compete with each other. I

would say, that being so, that Kellogg's Corn Flakes sells at a lesser volume than it would if it had the field to itself without that competition. If there were not the demand for Post's products, it would go to Kellogg. If there were no such thing as Post Toasties, Kellogg would have the field on that brand. When one company has had the field for many years, and another product substantially identical comes on the market, it would to some extent, I think, affect the sales of the original. It splits the volume.

The representatives of Kellogg visit me. When I place an order, I place it through a local representative here. They came and showed me the Whole Wheat Biscuit. They told us they were out with a new package, and they showed us a cellophane front, brought out the fact that it was a twelve-and-a-half ounce package with the little biscuit, and asked us if we would take it on. We usually support any big manufacturer with a nationally advertised reputation, on any product. I do not recall whether they said anything about shredded wheat at that time. There was no comparison of the package containing fifteen biscuit instead of twelve at the time they originally sold it. That representation has been made to us since. We naturally run into that, because the retailers, especially the hotels and restaurants, like to know how many pieces are in a package, so as to take care of service. So it was an obvious and natural thing that the package and the biscuit itself should be compared with Shredded Wheat.

The Kellogg Company originally sold us their whole wheat flake, and no sample or anything was ever shown. They came, told us what they were doing, asked us if we would not take it on. They said they were working with it. We have confidence in the Kellogg Company. I think, if the National Biscuit Com-

pany asked us to do the same thing on one of their products, we would certainly do as much for them. The whole wheat flake falls into the same class as corn flakes, similar to Wheaties and Rice Krispies.

RE-DIRECT EXAMINATION.

THE WITNESS: It falls in that class, corn flakes and wheat flakes.

If Kellogg was advertising its biscuit, sampling it to the consumer direct, demonstrating it in stores, having store displays, and dealer advertisements of the product, and was also advertising the product to the public, I would not think that those efforts and methods of the Kellogg Company would have any depressing effect on the sale of shredded wheat as a whole. If a third company came in and concentrated on shredded wheat as vigorously as you have assumed the Kellogg Company did, I think those efforts would tend to raise the sale of the product as a whole. I would think that the more concerns which are pushing the sale of a product, the more the sales would tend to rise, depending on the use of intelligent sales methods. I think that would be true of any product. If the Postum Cereal Company were also pushing and advertising the sale of corn flakes, that would help swell the total volume. I do not think the retailers are now making any effort to substitute one product for another. They are selling what they have on consumer demand.

RE-CROSS-EXAMINATION.

THE WITNESS: I know that from what we hear at stores. We have talked to the store managers as they come down. We get them to feature our particular house brands up there, telling them to what extent to sell what they have, instead of trying to carry

everything that Tom, Dick and Harry comes in and asks for. It is possible we might find even some of our own retailers occasionally passing out a package of whole wheat biscuit when shredded wheat was asked for. I do not think it is the policy of any grocery chains to try to substitute. I think they sell the stuff there is a demand for.

I have a general idea of the issues in this case, which I learned from talking with Mr. Clarke this morning, and I have read it in the paper also. I read in the paper that the National Biscuit Company sued Kellogg about shredded wheat. I testified for the Kellogg Company. I am not interested in either party, and I do not take sides with either. I am just as good a friend of the National Biscuit Company as I am of the Kellogg Company. I understand that the controversy relates to the question as to whether the name of the Kellogg product should be written with capital letters or small letters, Kellogg's shredded wheat. I know that, and I mean what you mean by that. In at least twenty-two years of my own experience, I have known all about the one shredded wheat and that shredded wheat became a household word in the United States for that particular article. That is true.

ROBERT WHITFIELD.

Deposition taken at Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a wholesale grocer and have been in that business about nine years. I am one of the buyers of the Central Wholesale Grocery, a co-operative organization having a chain of retail stores that it services about three hundred and eighty

stores. It does not service any stores outside that chain.

Our organization handles Kellogg's Whole Wheat Biscuit, carries it regularly in stock, and services it to its stores. It has handled Kellogg's Whole Wheat Biscuit approximately three years, as far as I know it. There is a regular demand for it from our stores.

We handle the other product, the National or Niagara Shredded Wheat, and have had that for a number of years. I do not find any confusion in orders as between those two products. They order either shredded wheat or Kellogg's Whole Wheat Biscuit. I could not say if we have orders for Kellogg's shredded wheat. I suppose we do, but I do not really know. If an order comes in for Kellogg's shredded wheat, Kellogg's biscuit is supplied.

We have meetings with the men of those stores. I really cannot say whether it is the policy of the organization to substitute anything or not, one way or the other. Kellogg's Whole Wheat Biscuit was introduced into our organization by being sold to us, and we, in turn, informed our retailers that we handled it, through a bulletin.

I recognize Defendant's Exhibit 4, which is a carton of Kellogg's Whole Wheat Biscuit. I am familiar with the dress of the rest of the Kellogg line of packages, Corn Flakes, Pep, and so forth. I would say there is a family resemblance or connection between this Whole Wheat Biscuit product and the rest of the Kellogg line as to coloring and dress. It also has the Kellogg trade-mark.

CROSS-EXAMINATION.

THE WITNESS: The Kellogg whole wheat carton, like Plaintiff's Exhibit 161, is the only one of the Kellogg packages that has the cellophane window, the one

in which Kellogg's Whole Wheat Biscuit is displayed to the public.

I have been familiar with shredded wheat ever since I can remember. It has always been sold in a package similar to Plaintiff's Exhibit 1, and it has always been known as Shredded Wheat.

I do not think some of my customers, in filling an order for Shredded Wheat, would mention anything about the Kellogg biscuit. To me, if anyone asked for shredded wheat, they would get Shredded Wheat. If they asked for Whole Wheat Biscuit, they would get Whole Wheat Biscuit. If a person asked for Shredded Wheat, I would know right away what they wanted. There would be no question of handing them anything else.

I am the buyer for this Co-operative General Grocery, called the Central Wholesale Grocery. We do not have any name for the chain, no uniform name for the stores. They have their regular front. They are service stores. It is a voluntary organization of service stores who centralize their buying through my house.

Our stores are stockholders. Every member is a stockholder. There are three hundred and eighty. I imagine they all stock Shredded Wheat. I do not think they all stock Kellogg's Whole Wheat Biscuit. We carry it to service our stores with. We have a regular business that requires us to stock it. We do not carry stocks of other National Biscuit products. They are delivered to our members direct. Some of our stores are customers of the National Biscuit Company and probably also obtain their Shredded Wheat along with their crackers. Our organization is recognized by the National Biscuit Company for its discount, and our Central warehouse receives the discount, based on the purchases of all our members.

RE-DIRECT EXAMINATION.

THE WITNESS: I think it is about a year ago since they brought the package with the cellophane window in and showed it to us.

EDWARD A. NOVAK.

Deposition taken in Chicago, Illinois, March 15, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am buyer and manager for the General Grocers Cooperative Organization. I have been in this cooperative business eight months. I was in the grocery business before that for twenty-nine years, as buyer and manager in the wholesale grocery business and for myself. I have had no retail experience.

The organization I am with now just services its own members. It is what you call a voluntary chain. The stores have no particular dress. They carry their own name, or they run under our name, the General Grocers. There are one hundred and forty members in the organization.

We carry Kellogg's Whole Wheat Biscuit and have, I think, ever since we opened up here. We find there is a demand for it from our members, which is increasing right along. We started with a few cases, and we are now buying it in larger quantities.

We do not handle the other product, the National or Niagara Shredded Wheat. We used to handle it. When we first organized, sometime in June we got in ten cases. Then we found out the National Biscuit Company delivers it to the grocers and merchants for the same price, so I discontinued handling it, because I could not save the merchant any money on it.

Kellogg's Whole Wheat Biscuit is ordered from my house by my customers under the name Whole Wheat Biscuit. We do not get any orders for it as Kellogg shredded wheat. If we did, I would naturally fill it with Kellogg's, as long as they asked me for Kellogg's. If they asked me for Kellogg's Shredded Wheat, I would send the Kellogg's Whole Wheat Biscuit.

We have conferences with our members. I know that the demand for Kellogg's Whole Wheat Biscuit was created through the specialty men that Kellogg have out with the trade. They have a list of our members, and they go in and contact our members, and put the biscuit in in that way.

Substitution is not practiced in our organization. Assuming that the Kellogg Company, through its specialty men, goes from house to house of consumers and samples or distributes free packages of Kellogg's Whole Wheat Biscuit, that it conducts demonstrations, and also has the benefit of dealer advertising, and also advertises the Whole Wheat Biscuit itself to consumers, that it has the cooperation of the trade in displaying various selling helps, such as displays of Whole Wheat Biscuit, posters and window displays, I think it is only natural that it would increase the business, where they did have demonstrations. I know for a positive fact that the Kelloggs have had demonstrations in stores just on the Whole Wheat Biscuit. Those demonstrations increased the demand for the Kellogg product. That is what increased our demand.

The stores also ask their customers if they will not try something new, which would have an effect of increasing the sales, bringing it to the attention of new customers, also. Several of our stores give that form of cooperation to the Kellogg Company, and it is regarded as legitimate.

CROSS-EXAMINATION.

THE WITNESS: I do not mean to be understood as saying that our member stores no longer carry Shredded Wheat. They get it direct from the National Biscuit Company. I simply meant that, because they can buy it as well as we could, we discontinued stocking it. The only reason I would stock it is because I would save money to our members. Ours is a purely hundred per cent. cooperative organization. We serve only stockholders of our group. We do not service other stores in general. Our group consists of a hundred and forty service stores, located all over Chicago. Our headquarters happen to be in Cicero, now. We have had calls for shredded wheat. When we do, we tell them to get it direct, referring them to the National Biscuit Company, because we do not buy it. When we have a call for Shredded Wheat, we know by that expression right away what the customer has in mind, this package, like Plaintiff's Exhibit 1. I have handled that package for thirty years. You know it is shredded wheat, that is what every one has known it as for a great many years. The expression "shredded wheat" was made a household word by the Shredded Wheat Company.

I see Plaintiff's Exhibit 10, with the representation of two biscuit in a dish on the end. I do not remember that carton so much as I do Plaintiff's Exhibit 1. I could not say if I have ever seen shredded wheat advertised with two biscuit in a dish. I remember distinctly that package, very well.

RE-DIRECT EXAMINATION.

THE WITNESS: I have known of the Kellogg Company making a pillow-shaped or puffed shredded wheat biscuit since, I think, 1920. We used to handle quite a bit of Kellogg products. I have a picture of the front

of our building at 912 Randolph Street, displaying a package of Kellogg's biscuit. I remember the package of flattened biscuit they used to use. I remember that, as early as 1920, or around that time, they brought out a puffed or pillow-shaped biscuit. I remember when that biscuit product came out. There has not been much of a movement on it until the last few years.

RE-CROSS-EXAMINATION.

THE WITNESS: That 1920 biscuit looked as much like shredded wheat as the present whole wheat, except it was a little bit smaller. Otherwise, it resembled it. I do not know if we handled it when it was called Kellogg's Shredded Whole Wheat Biscuit. We handled it before the package Plaintiff's Exhibit No. 165, and we handled that, so we have handled the Kellogg product for some years. At the time we handled this, we also stocked shredded wheat. We stocked the two of them at that time. I used to buy the National product at that time from George Green here in Chicago, the district sales manager of the National.

ROY B. LOVERIN.

Deposition taken at Chicago, Illinois, March 15,
1933.

DIRECT EXAMINATION.

THE WITNESS: I am store manager for the Kroger Grocery Company. I have been in the grocery business about thirty-five years, and with this company three years. The Chicago branch of my company is all I am familiar with. They have three hundred and fifty stores under their control. As store manager I have direct relation with all those Chicago stores. My position includes training the clerks, students, to be future clerks and managers.

The Kroger stores carry Kellogg's Whole Wheat Biscuit, which is a regular stock product with them. There is a consumer demand, to my knowledge, for that product in the Kroger stores. The Kroger organization put sales effort behind the sales of that product. I frequently get window posters and big placards that stand up in the window or in convenient places, advertising the different Kellogg products: Corn Flakes, Whole Wheat Biscuit, and things of that nature. I think those efforts have an effect on the sale of Kellogg's Whole Wheat Biscuit. They are especially well gotten up. I know of no particular reason why they should not.

Our stores handle Niagara Falls Shredded Wheat. It is usually asked for in our stores as Shredded Wheat. I can sell Kellogg's Whole Wheat Biscuit in my store better. When a customer comes into the store, my instructions to the clerks are that, if she asks for shredded wheat, she gets Shredded Wheat, without any question. However, we try to show her something new on the market, when there is something new that is all right, even though it is similar in character to the other product. We show her the difference between the two products and let her make her own decision. We do that with the Kellogg biscuit. I do not know that we do it for every customer. If she comes in the store during a rush hour, we naturally do not. We do it often with the customers who come in. That is not regarded in the trade as illegitimate. If we only knew one kind of product in the world, we would all be eating the same kind of food, I presume, just corn meal and mush, or something of that kind. Our company does not regard it as improper, unless the woman comes in and asks for shredded wheat, and then, without telling her anything about it, you would give her a package of the Kellogg product. That would be improper. Our organization does not do

that. If anything new comes on the market, we always do that, if we have an opportunity, and we do it with the Kellogg's Whole Wheat Biscuit.

Q. 20. If we assume, Mr. Loverin, that in addition to that sales cooperation which you give the Kellogg Company, the Kellogg Company also advertises its Whole Wheat directly to the consumer through periodicals and papers and so forth, and that it also employs specialty men who distribute the product directly to the consumer by going from house to house and selling one or two packages and throwing in a third package free, and that it also has store demonstrations, and that it has window displays, and that it also sends out post cards to lists which it gets from the retailers, of their customers, and sends to those customers coupons which are redeemable by buying one package of Whole Wheat Biscuit and having another one free; if you assume that it does those things, would you say that it has the effect of increasing or decreasing those sales?

A. It would have the effect of increasing them.

THE WITNESS: It is done frequently that way, cards, solicitors, and everything else. Our firm notices it has considerably increased. I consider the Kellogg Whole Wheat Biscuit as a product that is increasing in public popularity. Before I was located where I am now, I was in the Evanston Store, opening up a new store. The manager, Mr. Howard, marveled at the vigorous demand for Shredded Wheat and Whole Wheat Biscuit, even in the off season. He could not understand why we sold so many Whole Wheat Biscuits and Shredded Wheat Biscuit at that time of the year, when people should be eating corn flakes.

If two concerns are advertising Whole Wheat Biscuit to the customer, that would absolutely tend to increase the demand, rather than to decrease it. We

have had considerable to contend with in that regard. New concerns have come out with new bread. The more advertising they do with that, the more we sell of our own, in spite of having our competition with their bread.

CROSS-EXAMINATION.

XQ. 25. Mr. Loverin, you were speaking of the introduction of new products, some other products. Now, just tell us the practice in your stores when a customer comes in and asks for shredded wheat. You said that is what she gets; but what does your grocer or your clerk or manager offer her in place of Shredded Wheat?

A. We do not offer anything in place of it. We bring the package of Shredded Wheat out and we bring one of the Whole Wheat Biscuit out, and these are now put up with the cellophane front, like this one.

THE WITNESS: We show her the difference between the biscuit, have a sales talk, and tell her about it being toasted, one on one side and one on both sides, it having fifteen biscuits in the box instead of twelve, and so on. Then they put it on the counter and let her make her own decision.

I have no grudge against Shredded Wheat Biscuit, but we do push the Kellogg's Whole Wheat Biscuit. I do not know if we get a little better profit out of it or not. The two products both sell at the same price. I presume the sales talk that our manager puts up so well results in selling a great many of the Kellogg's Whole Wheat Biscuit instead of Shredded Wheat. Anybody that has eyes at all can see the difference between them. When you put them up side by side, you can see the difference between them. It fills the same want. If, in filling the order, I sell a customer Whole Wheat Biscuit instead of shredded wheat, I

obviously have sold him something that fills the same requirements. So, although I say I do not practice substitution, I am nevertheless able, very frequently, to sell Kellogg's Whole Wheat Biscuit to a customer who has asked for shredded wheat; but there is a reason for our wanting to sell our Kellogg's Whole Wheat Biscuit, in that we want to sell them not only those biscuit, but a larger line to sell from. We know, if we can sell her our whole shelf full of Kellogg's products, we are more likely to sell her than if we are just selling her this, Plaintiff's Exhibit No. 1. Also, she is more likely to come back and ask for more.

I find that customers who habitually buy Kellogg's shredded wheat are habitual buyers of other lines of cereals. They trade off. People get pretty tired of just eating nothing but shredded wheat. I have known shredded wheat, like Plaintiff's Exhibit No. 1, during all my thirty-five years' experience. I presume the Shredded Wheat Company has spent vast sums advertising shredded wheat. I have seen some advertising. They use some of the various methods of advertising recited by Mr. Clarke in his questions. As far as the dealer is concerned, I have never had any advertising matter on the shredded wheat. I have seen it, however, in magazines and booklets. I never saw any demonstrations. I never saw any of the little machines they set up to make shredded wheat biscuit. My experience has always been in the wholesale end of the business, not at all in the retail. I am manager of a retail store now. Real live customers come in and buy merchandise there. I am manager of just the one store, located at 209 East 79th Street, on the south side, farther south and west than the Jackson Park district. So I am now in the retail grocery business. We are a service store, making deliveries, receiving a few telephone orders, and doing a cash business, with no credit.

On a telephone order, if a customer asked for shredded wheat, he would get shredded wheat. There would be no chance of selling the Kellogg line at that time.

The result of the advertising and popularization of shredded wheat biscuit has been to make it a very well known product, in my experience. I guess almost everybody knows that shredded wheat is. In fact, for thirty-five years they have known it by that name, and they would not ask for shredded wheat by any other name.

They never ask for Kellogg's shredded wheat biscuit. They ask for Whole Wheat Biscuit or Kellogg's, or they point to it and say: "Give me one of those Kellogg's up there." I do not think I have ever had a customer ask for Kellogg's shredded wheat. I serve several customers every day, and it would not be impossible. If I would say anything, I would say yes, but without absolute knowledge. I do not think I ever paid particular attention to whether they asked for just Kellogg's shredded wheat.

Both products are displayed prominently in our stores. I have a counter that comes around where they are both displayed. They are perhaps fifteen feet apart.

We do not have people come in and help themselves in our store. They ask for what they want. We carry the Kellogg product in the package with the glassine window, altogether that way now. It came out originally without the cellophane. Those packages are displayed on our shelves so that the biscuit are visible and the customers can see them and point out what they want.

I cannot recall the time when Shredded Wheat like Plaintiff's Exhibit 1 was first put on the market. I cannot remember when it was not on the market. It seems to me I have always heard of shredded wheat.

It was a new kind of food product, and I knew people had to be really taught to like it and use it. I presume that is where the Shredded Wheat Company did pioneer work on that kind of food. Of course, the Kellogg Company are doing a great deal of advertising, themselves, educating people. The store managers are also showing them the difference. They are helping to introduce the biscuit, but I would think their task is made easier by the thirty-five or forty years during which the Shredded Wheat Company has made and advertised that type of food. I do not think there is any question about that.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not know of my own knowledge that the Kellogg Company has encountered very great trade resistance through the charges made and the litigation conducted against its product. I do not know what this suit is all about.

Which product they get depends on who the customer is. A store like mine, you get to know the same people who come in day in and day out pretty well. Clerks who wait on them know them very well, and their likes and dislikes. After you have waited on them for awhile, you know if, when they ask for shredded wheat, they want shredded wheat. With people who do not come in regularly, you do not always know what they want. We get to know them and we give them shredded wheat if they ask for shredded wheat. If the other people who ask for shredded wheat want Kellogg's, they get Kellogg's, because we know the individual customers.

RE-CROSS-EXAMINATION.

THE WITNESS: We have some individual customers who ask for shredded wheat and expect to get Kellogg's biscuit. We know which they are. Sometimes we make a mistake and get the wrong one, and they tell

us about it, too. They get the shredded wheat and they tell us they want the Kellogg's. If we stop and think they use the other one, we give it to them. Sometimes it happens the other way about, that they get Kellogg's when they really want shredded wheat. They get in the habit, now, of just asking for shredded wheat; but the majority of them will specify either shredded wheat or Kellogg's. There are a few of them who have become familiar with it to whom we have sold the idea of Kellogg's Whole Wheat Biscuit in place of shredded wheat, who will ask for shredded wheat and expect to get Kellogg's.

RE-DIRECT EXAMINATION.

THE WITNESS: There is a general family resemblance between the coloring and the getup of Kellogg's Whole Wheat Biscuit and the rest of the Kellogg line, such as Corn Flakes. In the red and green colors, it has the same coloring in all their packages.

